IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 77-3

JOHN GISH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

EMIL OXFELD,
ROTHBARD, HARRIS & OXFELD,
Attorneys for Petitioner,
744 Broad Street,
Newark, New Jersey 07102

BARRY A. AISENSTOCK,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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Petitioner, John Gish, respectfully prays a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey, affirming the determination in the Appellate Division, Superior Court of New Jersey, denying him the right to examine the psychiatrists appointed by respondent, said psychiatrists (1) received a hypothetical question from respondent allegedly describing petitioner and (2) rendered an opinion with regard to petitioner; said opinion now being the basis for re-

spondent's request that petitioner submit to a psychiatric examination before one of the psychiatrists.

The Supreme Court of the State of New Jersey rendered no opinion, instead disposing of petitioner's appeal by order denying the granting of Certification. A copy of that order, is reproduced in the Appendix at page A1. The Appellate Division of the Superior Court of New Jersey denied petitioner the relief sought therein. The opinion of that court is reproduced in the Appendix commencing at page A2.

Jurisdiction

Petitioner was required by an Administrative body to submit himself to a psychiatric examination. Next followed an Administrative Appeal. Thereafter petitioner appealed the matter to the Appellate Division of the New Jersey Superior Court and from an adverse ruling at that level to the Supreme Court of the State of New Jersey.

The decision of the Supreme Court of New Jersey, the highest court of this state which may review such matters, refused to consider petitioner's claim.

This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

Questions Presented for Review

1. The directive to appellant to submit to a psychiatric examination violated his constitutional rights, as contained within the First and Fourteenth Amendments of the United States Constitution.

2. The denial of the opportunity to examine the psychiatrists and the bases for their opinions so that petitioner might persuade respondent Board of Education that he need not undergo a psychiatric examination effectively denies petitioner his constitutional rights to due process.

Statutes Involved

This case presents questions touching upon the First and Fourteenth Amendments to the United States Constitution as applied to New Jersey Statute 18A:16-2, which are reproduced in the Appendix (57a).

Statement of the Case

John Gish (petitioner) has been employed by the Paramus Board of Education since 1965. Between 1965 and 1972 he taught classes in English and related subject matter. In addition, he served in various capacities in extracurricular activities. In June of 1972 John Gish assumed the Presidency of the New Jersey Gay Activist Alliance. Thereafter he participated in a number of media communications to promote the cause of the alliance and explain its purpose to the general public in the hopes of eliminating discrimination against gay individual. He also participated in other political activities.

As result of the foregoing events, the Paramus Board of Education restricted petitioner from making use of any of the facilities of the school or having contact with any of the students or other individuals outside the confines of the administrative office assigned to him. When these actions of the Paramus Board of Education were successfully overturned in arbitration, the board took further

action to challenge the rights of petitioner by creating charges against him before the Commissioner of Education seeking to terminate his employment. Said charges incorporated respondent's original rationale to restrict petitioner and added a statement that he refused to comply with demands for a psychiatric examination.

At that time the Board of Education suspended Mr. Gish. The Commissioner of Education determined the issues regarding the tenure charges and Mr. Gish's appeal from the requirement that he sit for the psychiatric examination simultaneously.

Petitioner excepted from the directive that he sit for psychiatric examination inasmuch as he desired a right to persuade the Board of Education that such action was necessary. So as to properly present his case, Mr. Gish, through counsel, desired to examine respondent's psychiatrists who had previously rendered an opinion as to Mr. Gish upon a hypothetical created by the respondent.

The Commissioner of Education found that petitioner's activities did not diminish his performance as a teacher, or prejudice or have deleterious effects upon the students, faculty or school system in any manner. Accordingly, while the Commissioner would not abrogate the requirement that Mr. Gish sit for the psychiatric examination, he did determine that petitioner should be returned to his position of employment immediately.

We now face a situation wherein petitioner has been required to submit to a psychiatric examination on the grounds that he has demonstrated a deviation from normal mental health so as to affect his ability to teach children, but at the same time returned to his position of employment inasmuch as he is not either harmful, prejudicial or deleterious to the school system. (The Commissioner of Education's opinion may be found at 14a).

REASONS FOR GRANTING THE WRIT

I

The writ should issue as to the first question presented because the courts below failed to act to protect the integrity of its own process and petitioner's right to a meaningful appeal in apparent conflict with sound principles of judicial administration and fundamental notions of justice.

Petitioner's rights, as guaranteed by the First and Fourteenth Amendments to free speech and free association become suborned to the will of a governmental agency, when it seeks to require of him the submission to a psychiatric examination based on his availing himself of these First Amendment Rights. Respondent initially restricted petitioner's territorial and communication rights by transferring him to an administrative post. Such conduct by the respondent was overturned by an arbitration award. Respondent then sought to circumvent the effect of that award by creating an allegation leading to the demand for psychiatric examination.

As can be seen from the decision of the Commissioner of Education, the determination of the State Board of Education and the Appellate Division of the State Court of New Jersey, respondent failed to discover even one instance where petitioner's classroom conduct or his activities in connection with the school system or students departed, in any manner, from [illegible] prescribed standards for the conduct of teachers. *Perry* v. *Sinderman,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Healy* v. *James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d

731 (1969); *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Russo* v. *Central School District No. 1,* 469 F. 2d 263 (2d Cir. 1972), *cert. den.* 93 S. Ct. 189 (1973); *James* v. *Board of Education,* 461 F. 2d 566 (5th Cir. 1969); *Pred* v. *Board of Education,* 461 F. 2d 851 (5th Cir. 1969); *Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966); *Hanover* v. *Northrup,* 325 F. Supp. 170 (D. Conn. 1970) support petitioner's assertion.

Respondent board of education never took action as long as John Gish remained an undercover dissenter. It was only when he publicized his preference, in seeking full rights for other, that the board reacted against him. In *Bernasconi* v. *Tempe Elementary School District No. 3,* 548 F. 2d 857 (9th Cir. 1977), the court examined the situation wherein a teaching staff member was transferred after she attacked certain actions by the school administration. Therein the court found that this penalty, lesser than termination, was in retaliation for Bernasconi's action under her First Amendment right of free speech. Likewise, in the matter *sub judice,* Mr. Gish has made use of his First Amendment Rights to free speech.

Quite clearly, the respondent board of education, now retaliates against petitioner for availing himself of these rights. As can be seen from the hypothetical created by respondent and presented to its psychiatrists (found within the decision of the Commissioner of Education, Appendix 24a), respondent moves to assess a penalty lesser than absolute dismissal, but one which would effectively silence Mr. Gish from making further political statements, and damage him in the eyes of others.

Most recently this Court examined the rights of free speech guaranteed to non-tenure teaching staff members not reoffered employment. In *Mt. Healthy City Board of*

Education v. *Doyle*, —— U.S. ——, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), the court considered a District Court trial determination wherein the respondent was not re-offered employment after he had been involved in several altercations and had issued a verbal communication to a radio station concerning certain employment conditions. The Court carefully examined the question to be determined by the District Court upon remand. The Court noted that the teacher had carried his burden of proof in demonstrating the initial issue that his exercise of his free speech guarantees under the First Amendment appeared to have been the causative factor for his non-reoffering of employment. But the Court noted that the balance of First Amendment speech rights for governmental employees may be overcome when it is a marginal issue. The Court indicated that the petitioning board of education should be given the opportunity to demonstrate that it had other sufficient grounds paramount to the interest of the school system as the basis for its non-reoffering. It is only in that event that an individual's First Amendment Rights to free speech may be overshadowed. In the matter *sub judice*, petitioner has not been given an opportunity to carry his burden by reason of respondent's refusal to allow him to examine the psychiatrist.

The courts below cast these requirements aside when they asserted that all was needed was a possibility of harm. In reaching that conclusion the court relied upon *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13 (App. Div. 1974), certif. den. 65 N.J. 292 (1974). Of course, there is one extreme distinguishing factor between the matter *sub judice* and *In re Grossman*. The *Grossman* matter presented a specific instance where actual harm had occurred to the students contrary to the facts in the present matter, even as set forth in the hypothetical presented by the respondent board of education and the find-

ings by one of its own doctors. It is precisely because of the fact that respondent fails to demonstrate any rational connection between the events described in the hypothetical question and petitioner's teaching ability that we come to point 2.

II

The writ should issue as to the second question presented because petitioner cannot properly present its argument without access to the psychiatrist.

All opinions below have labeled the actions of the respondent board of education as meeting minimal due process standards. Reliance is had upon *Kochman* v. *Keansburg Board of Education,* 124 N.J. Super. 203 (Chan. Div. 1973), wherein a New Jersey Court sustained the Constitutionality of the statute herein involved, N.J.S.A. 18A:16-2. In that determination the court established that a petitioner is entitled to a statement of reasons and an informal hearing if requested. While such determination satisfies the form of due process, in the matter *sub judice* the application of the statute, N.J.S.A. 18A:16-2, in the manner applied offends the requirements that petitioner be entitled to due process prior to sacrificing his First Amendment Rights.

Respondent board of education ordered John Gish to appear before a psychiatrist. The psychiatrist had rendered an opinion regarding Mr. Gish based upon a hypothetical presented by the respondent board of education. Accordingly, it appears that Mr. Gish will not be examined by an impartial individual in violation of the due process clause of the Fourteenth Amendment.[1]

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[1] *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1969) ". . . an impartial decision maker is essential" to due process in an administrative hearing concerning the proposed termination of welfare benefits.

(Footnote continued on following page)

Herein, petitioner sought to examine the psychiatrists to determine their impartiality inasmuch as they had rendered an opinion based upon the hypothetical which allegedly described Mr. Gish. Petitioner is unable to determine the true and total effect such action of pre-determination may have upon his rights.[2] Accordingly unless a determination can be made as to the lack of partiality of the psychiatrists, they are now "tainted" and their further involvement ignores the requirement for impartiality as a condition of guaranteeing petitioner's Fourteenth Amendment due process rights.

(Footnote continued from preceding page)

Morrissey v. *Brewer*, 408 U.S. 471, 486 (1972) due process requires a "neutral and detached" hearing body in parole revocation proceedings.

Simard v. *Board of Education*, 473 F. 2d 988, 993 (2d Cir. 1973) "an impartial decision-maker is a basic constituent of minimum due process".

[2] *In Re Murchison*, 349 U.S. 133, 136 (1955) "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . ."

Ferguson v. *Thomas*, 430 F. 2d 852, 856 (5th Cir. 1970). "Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that . . . [the] hearing should be before a tribunal that has an apparent impartiality toward the charges."

Baird v. *Strickland*, 74-1 Civ-Oc M.D. Fla. March 18, 1974 at 4-5, teacher did not receive a due process hearing because, *inter alia*, the tribunal lacked the appearance of impartiality owing to the participation in the deliberations of the tribunal of one member of the Board who had been personally involved in filing the complaint against plaintiff.

The opinions below purport that petitioner's rights may be vindicated upon an administrative appeal to the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. Nowhere has there been made any account for the fact that a stigma attaches to the initial determination. In addition there is no way to eradicate this stigma from the records once it occurs. No remedial procedure exists for the elimination of the records within the hands of the psychiatrists or within the records of the respondent school board system nor is there any authorization granted to the Commissioner of Education for the removal of such records or for their sealing.[3]

In this fashion respondent imposes a stigma upon petitioner which creates a disability that might foreclose his ability to obtain employment opportunities in the future. The New Jersey Court recognized such a situation in *Williams* v. *Civil Service Commission,* 66 N.J. 152, 329 A. 2d 556 (1974). Therein the court examined a government employee's rights under *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The New Jersey Supreme Court held that Williams, while not having a strict property interest, did have a "liberty" interest which procedural rules could not deprive him of in light of constitutional requirements. Accordingly, the court ordered the local municipal agency to grant Williams a full adversary hearing. In that manner no stigma would attach in violation of his rights. Likewise, in the matter *sub judice,* respondent must permit petitioner the opportunity to examine the respondent's psychiatrists. To permit respondent to proceed without this minimal due

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[3] No statute exists which parallels N.J.S.A. 2A:164-28, wherein a criminal conviction may be expunged from the record. Thus, the requirement that petitioner submit to a psychiatric examination, creates a record which remains in perpetuity.

process procedure makes petitioner's constitutional rights hollow rights. Thereafter, if any stigma were to then attach it would not occur in violation of due process requirements of Fourteenth Amendment to the United States Constitution.

The Appellate Division of the Superior Court of New Jersey asserted that the failure to give an adverary hearing to Mr. Gish only would cost him "time." The Court's rationale arises from their erroneous conclusion that all wrong may be cured by an appeal. The court ignored the indelibility of the stigma which attaches by reason of the Board's intended action. The court pays no mind to the effect of the penalty imposed.

As was noted in *Adcock* v. *Board of Education,* 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P. 2d 900 (1973).

> "(l)esser penalties then dismissal can effectively silence teachers and compel them to forego exercise of the rights guaranteed them by our constitution."

109 Cal Rptr. 680, 513 P. 2d 904. Likewise effect attaches with the permanency of stigma resulting from psychological examinations. To the contrary is *Matthews* v. *Eldrige,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), while widely cited in administrative cases, does not apply to the matter *sub judice* for two reasons.

In *Matthews* the Social Security Administration found itself immersed in a host of administrative hearings. Here the needs for administrative hearings rarely arises; accordingly, an administrative burden, out of proportion to counter-vailing interest, does not occur. Secondly, Eldrige did not suffer irreparable injury inasmuch as he had recourse to full panoply of due process rights. This contrasts with the injury John Gish will sustain by the

creation of a permanent stigma to be assessed by those failing to comply with the due process procedurely required standard of "impartiality." The stigma respondent seeks to place upon John Gish in violation of his due process rights, destroys the "liberty" guaranteed through the United States Constitution. As discussed at length in *Huntley* v. *Community School Board of Brooklyn,* 543 F. 2d 979 (1976), the educator,

> "was entitled to a fair hearing prior to the Board's [action] which might impair his chances of future employment as a school supervisor and which might damage his professional reputation."

543 F. 2d at 986. In *Huntley* charges were read publicly against the plaintiff without granting him recourse to a hearing prior to the board's action. Thus, the charges may become part of his permanent record and may well impede his liberty right to seek future employment. Similarly, in the matter *sub judice,* a pre-examination determination has been made by the psychiatrists who will, if the board has its way, examine Mr. Gish. Have these psychiatrists made up their mind? We have no way of even beginning to answer this question without the opportunity to examine them. How else may we assure that a stigma destructive of both "property" and "liberty" rights within the meaning of the Fourteenth Amendment be avoided. Had the respondent board of education properly honored the rights of John Gish, no issue of stigma improperly created could arise. As set forth by Mr. Bryant George, member of the State Board of Education Law Committee, in his dissent from the Law Committee's administrative decision, he recognized the patent undermining of Mr. Gish's rights. Mr. George highlighted the board's abuse when he said:

> "Though use of discretion to demand a mental examination must have some rational relationship to a legitimate educational purpose or it must be shown that there is a clear and present danger to the health or safety of pupils or teacher."

(Appendix, 49a). Thus, he recognizes the avoidance of the due process standard even set forth in *Kochman, supra.*

Inasmuch as petitioner seeks a vindication of his rights in the application of the statute, N.J.S.A. 18A:16-2, and does not attack the constitutionality of the statute, *Hoffman* v. *Jannarone,* 401 F. Supp. 1095 (D.N.J. 1975) is inapplicable. The issue of application of the statute becomes crucial to protect petitioner's First and Fourteenth Amendment Rights. The failure to hold that they attach at the first step of the proceedings permanently destroys petitioner's rights. The stigma cannot be retroactively corrected; it will exist in perpetuity. Thus, while petitioner will lose something permanently, the granting of the hearing will only cost the respondent board of education time.

We respectfully submit that the case represents important constitutional questions where unconscious prejudice defeat important rights of freedom of expression, and the procedural techniques necessary to secure that freedom.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the court below.

Dated: June 28, 1977

Respectfully submitted,

EMIL OXFELD,
ROTHBARD, HARRIS & OXFELD,
Attorneys for Petitioner,
744 Broad Street,
Newark, New Jersey 07102

BARRY A. AISENSTOCK,
On the Petition.

APPENDIX A

Order of the Supreme Court of New Jersey, dated March 15, 1977

SUPREME COURT OF NEW JERSEY

C-541 SEPTEMBER TERM 1976

JOHN GISH,

Petitioner-Petitioner,

v.

THE BOARD OF ED. OF THE BORO. OF THE PARAMUS,

Respondent-Respondent.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of March, 1977.

FILED

March 15, 1977

FLORENCE R. PESKOE
Clerk

FLORENCE R. PESKOE
Clerk

A True Copy

FLORENCE R. PESKOE
Clerk

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

JOHN GISH,

Petitioner-Appellant,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,

Respondent-Respondent.

Argued: October 13, 1976.

Decided: November 4, 1976.

Before Judges Matthews, Seidman and Horn.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. Joseph A. Rizzi argued the cause for respondent (Messrs. Winne & Banta, attorneys; Mr. Robert M. Jacobs, on the brief).

Appendix B

PER CURIAM.

This appeal represents another step in the continuing efforts of the appellant John Gish to resist conformance to a directive of the Paramus Board of Education (Board) that he submit to a psychiatric examination. An earlier unsuccessful proceeding by which he challenged the constitutionality of the statutes under which the Board acted, N.J.S.A. 18A:16-2 and 3, is reported as *Kochman* v. *Keansburg Bd. of Ed.*, 124 N.J. Super. 203 (Ch. Div. 1973). These statutes read as follows:

> 18A:16-2. Physical examinations; requirement
>
> Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.
>
> 18A:16-3. Character of examinations
>
> Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof and of all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or, at the option of the em-

> ployee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

In affirming the constitutionality of these statutes Judge Lane appropriately stated: "Before a teacher is ordered to submit to a psychiatric examination, he is entitled to a statement of the reasons for such examination, *cf., Monks* v. *N.J. State Parole Board*, 58 N.J. 238, 249-250 (1971), and to a hearing, if requested, *cf. Williams* v. *Sills*, 55 N.J. 178, 186 (1970), * * *." *Kochman, supra,* at 213.

A brief history of the events constituting the prelude to this appeal is necessary. Appellant has been employed as a teacher in a high school under the jurisdiction of the Board since 1965. Until 1975 he taught classes in English and related subjects. In addition he was the advisor to the high school newspaper staff for several years, led to the production of a school play and for a number of years led a discussion on "Great Books." In June 1972 Mr. Gish assumed the presidency of the New Jersey Gay Activists Alliance and thereafter he participated in a number of communications through various public media in which he promoted the Alliance. He also attended a convention of the National Education Association and helped organize a caucus there.

On July 10, 1972 following a meeting held that day the Board adopted a resolution directing appellant to undergo a psychiatric examination by Dr. Richard Roukema pursuant to the foregoing laws. This resolution recited as reasons for the directive that the Board had authorized its Superintendent (of Schools) and the Board attorney to consult with Dr. Roukema, the Board's consulting psy-

chiatrist, as to his opinion whether the "overt and public behavior" of Gish indicated a strong possibility of potential psychological harm to students of the school district as the result of their continued association with him and that the doctor had given an affirmative reply.

Appellant then filed the above-mentioned action to test the constitutionality of the statutes under which the Board had acted. On June 7, 1973, after Judge Lane's opinion was entered, the Superintendent delivered to Gish by letter a copy of the July 10, 1972 resolution and a statement of reasons for the Board's requirement of the examination.

On June 28, 1973 the Board, by resolution, rescinded the directive that the examination be conducted by Dr. Roukema, reciting that it felt that it should be conducted by a psychiatrist "totally independent of the overt and public behavior" of Gish. It required the examination to be made by Dr. Edward Lowell instead of Dr. Roukema.

On August 9, 1973 the Board met privately with Gish and his two attorneys, at which time a letter containing additional reasons for the requested examination was given to him. At said meeting, the proceedings of which were recorded stenographically, Gish's attorney noted the absence of Dr. Roukema and that said absence "deprives Mr. Gish of that basic right to confront the witnesses against him." He then argued successively that the asserted reasons of July 9, 1972 constituted an attempted restriction on his client's right of free speech and free association, and that there was no finding by the Board that his client's activities as stated in the July 9, 1972 statement of reasons showed a significant deviation from mental health or adversely affected his ability to teach.

Appendix B

Since Gish and his counsel had not had an opportunity to study the additional reasons supplied by the Board, the Board and Gish agreed to meet again on August 22, 1973. Between these two meetings the Board presented a hypothetical set of facts, based on the reasons given theretofore to Gish, to Dr. Lowell for his opinion. On August 16, 1973 Dr. Lowell on the basis of said hypothesis reported that Gish showed evidence of deviation from normal health.

At the August 22, 1973 meeting, likewise stenographically recorded, a copy of the statement of hypothetical facts as well as the reply from Dr. Lowell was presented to Gish's counsel. Appellant's counsel argued that Dr. Roukema and Dr. Lowell must be produced for cross-examination, since their respective opinions were relied upon by the Board and their respective qualifications and credentials would be subject to questioning. Counsel indicated that following said cross-examination they might desire to produce opposing expert witnesses.

At the same meeting appellant's counsel again endeavored to persuade the Board that the examination was not properly sought. Counsel argued that the request for the examination was in violation of appellant's constitutional rights to free speech and free association; that one assigned reason was factually erroneous, and that others might furnish the basis for disciplinary action, if true, but would not support a determination that such an examination was reasonably appropriate.

On August 28, 1973 the Superintendent addressed another letter to Gish which again directed that he submit to the examination. The letter stated that the examination was sought on the basis of the earlier statements of reasons, the opinions of Drs. Roukema and Lowell, "upon

a consideration of the evidence presented by counsel on your behalf [at the hearings held on August 9, 1973 and August 22, 1973]" and because "the Board of Education has determined that your conduct during said period evidences a harmful, significant deviation from normal mental health affecting your ability to teach discipline and associate with students of the Paramus Public Schools * * *."

Thereafter Gish appealed to the Commissioner of Education. When he affirmed the action of the Board after an administrative hearing, Gish next appealed to the State Board of Education.[1] That Board affirmed the decision of the Commissioner by a divided vote. The present appeal followed.

As has already been indicated, the reasons which caused the Paramus Board of Education to seek the psychiatric examination revolve around appellant's undisputed activities in the Gay Activists Alliance. Included in those activities was his encouragement of a "Hold Hands Demon-

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[1] In his written opinion the Commissioner denied Gish's motion for "summary judgment" and held that a plenary hearing was unnecessary because the facts were essentially undisputed. He also noted that in a parallel proceeding resulting from proceedings taken by the Board after Gish filed his appeal to the Commissioner he had on the same date set aside, without prejudice, tenure charges certified to him by the Board and had ordered Gish's reinstatement to his last-held position of employment, with full back salary, pending final determination of his status after the psychiatric examination and the results reported to and reviewed by the Board. Appellant contends that he is now back in the classroom. The Board disputes this statement, insisting that he has since been employed in its administrative offices. This difference is not significant to the issues before us.

stration" as part of the Alliance sponsorship, on the George Washington Bridge on May 6, 1973. The full panoply of specific instances needs not be recited, because in large measure they appear to be factually uncontroverted. The position of appellant in his challenge below and on this appeal depends on the application of constitutional and legal principles, rather than upon a dispute of the substantive facts. And as part of this premise it may be added for the sake of clarity that the reasons do not include a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student.

With this background we now approach the arguments for relief which are advanced to us. The first is that the Board's directive to submit to the psychiatric examination constituted a violation of his constitutional rights under the First (freedom of speech and press) and Fourteenth (due process) Amendments as well as Article I of the New Jersey Constitution. Article I of the New Jersey Constitution vouchsafes rights and privileges which parallel in large degree those which are guaranteed by our federal constitution. However, our attention is not directed to any particular paragraph of Article I.

This contention is without substance. The right to speak freely has long been recognized as being not without some restriction. Whether or not it is constitutionally permissible may depend on its timing, its substance, its purpose, its truthfulness and other factors. It is certain that the guarantee is dependent on the circumstances of each particular instance. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), 89 S.Ct. 733, 21 L.Ed.2d 731. See also *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), 88 S.Ct. 1731, 20 L.Ed.

2d 811; *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), 84 S.Ct. 710, 11 L.Ed.2d 686; *Pietrunti* v. *Bd. of Ed. Brick Tp.*, 128 N.J. Super. 149 (App. Div. 1974), certif. den. 65 N.J. 573 (1974), *cert.* den. 419 U.S. 1057.

The Board does not question the right of Gish to say or to do any of the things which are mentioned in the statement of reasons. It simply contends that, as it has determined with the supportive corroboration of two psychiatrists, Gish's actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with the students.

School boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers. They are sufficiently equipped to conduct a fair and impartial inquiry whenever such issue legitimately comes into question. *Laba* v. *Newark Board of Education*, 23 N.J. 364, 384 (1957). Their obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical (*In re Fulcomer*, 93 N.J. Super. 404 [App. Div. 1967]) or otherwise. See *Morrison* v. *State Board of Education*, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P. 2d 375 (Sup. Ct. 1969). And they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action.

A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency." *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 32 (App. Div. 1974), certif. den. 65 N.J. 292 (1974), and authorities cited therein.

Appendix B

In *Adler* v. *Board of Education of the City of New York,* 342 U.S. 485, 493 (1952), 72 S.Ct. 380, 96 L.Ed. 517, it is stated:

> * * * A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. * * * (342 U.S. at 493; 72 S.Ct. at 385)

Human nature is such that beliefs and attitudes may not be shed by a teacher as he steps into the classroom.

In light of the foregoing, we are satisfied that the Board's determination was a fair and reasonable one, a determination which as stated by the Commissioner is "one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils." As noted, it was confirmed by two psychiatrists. It was based on credible evidence and did not constitute an abuse of discretion. *Rova Farms Resort* v. *Investors Ins. Co.,* 65 N.J. 474, 484 (1974).

We do not subscribe to appellant's second and last point—that he was entitled to but not afforded Fourteenth Amendment protections of due process because the two psychiatrists, Drs. Roukema and Lowell, were not produced for cross-examination. Although we observe that no advance warning or request for the presence of

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Dr. Roukema was given to the Board before the first meeting on August 9, 1973, that failure may be considered in assessing the sincerity of appellant's position, but it does not serve to defeat it.

At oral argument before us counsel candidly admitted that Gish was not entitled to the full sweep of due-process rights as contemplated by the Fourteenth Amendment. However, he first urges under this point that due process requires an impartial decision-maker who has the appearance of impartiality as well as actual impartiality.

The principles asserted are not in dispute. However, they are misapplied, for several reasons. First, they apply to an official or body whose purpose in conducting the hearing is to determine whether sanctions or penalties shall be imposed. A requirement that appellant subject himself to a psychiatric examination can hardly be classified as a penalty or a sanction. See *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), 92 S.Ct. 2593, 33 L.Ed.2d 484; *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), 90 S.Ct. 1011, 25 L.Ed. 2d 287. What is due process depends upon what the State or governmental body seeks to take from or deprive a person of receiving.[2] *Monks* v. *N. J. State Parole Board*, *supra*, at 245. "* * * [I]n determining what procedures [are] required, the competing interests of the individual teacher and the school board must be balanced." *Drown*

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[2] The Board [sic] attempted to scrupulously follow the directive from the Assistant Commissioner of Education dated February 2, 1972 which called to attention of local boards of education that any individual of whom such examination (under N.J.S.A. 18A:16-2) is required should be given the reasons therefore by the board and also "the right to be heard by the board" before the statute is applied.

v. *Portsmouth School District,* 435 F.2d 1182 (1 Cir. 1970), cited with approval in *Monks, supra,* at 245. Appellant was afforded the opportunity to be heard after the specific reasons were furnished to him.

The submission by Gish to a psychiatric examination takes nothing from him except his time. His status as a teacher continues with full rights under the law. Therefore, from the standpoint of his being deprived of a right or privilege it is minimal, except as it may loom in his mind. But that subjective apprehensions cannot control or limit the Board's right and obligation. As already indicated, the role of teachers in the shaping of young minds is a sensitive one. This very sensitivity adds weight to the side of the Board in the mentioned competing interests between it and the teacher.

In any event, appellant was not deprived of such due-process right, even if applicable. The order of the Board was subject to a hearing and determination by the Commissioner, N.J.S.A. 18A:6-9, and a further review by the State Board, N.J.S.A. 18A:6-27, as was had in the instant case. The hearing before the Commissioner was *de novo* and not limited to a mere review of the proceedings before the Board. On appeal to the Commissioner, Gish filed a petition and the Board filed an answer. The proceedings, as stated by the Commissioner in his written decision, then became fully adversarial "with all the elements of due process. * * * [A] pre-hearing conference is held. The issues are defined and procedures are determined. If a fact-finding hearing is necessary, witnesses may be subpoenaed to testify and are submitted to cross-examination." *Winton* v. *Bd. of Ed. of So. Plainfield,* 64 N.J. 582 (1974); *Schwarzrock* v. *Board of Education of Bayonne,* 90 N.J.L. 370 (Sup. Ct. 1917). See also *Ludwig*

v. *Massachusetts,* U.S. , 96 S.Ct. 2781 (1976); *North* v. *Russell,* U.S. , 96 S.Ct. 2709 (1976). *Cf. In re Fulcomer, supra.*

Finding no error in the decision of the State Board of Education, its determination is accordingly

AFFIRMED.

APPENDIX C

Decision of the New Jersey Commissioner of Education, December 2, 1974

JOHN GISH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,

Respondent.

COMMISSIONER OF EDUCATION
DECISION

For the Petitioner, Norman L. Cantor, Esq.

For the Respondent, Winne & Banta (Joseph A. Rizzi, Esq., of Counsel; Robert M. Jacobs, Esq., on the Brief)

Petitioner, a teacher with a tenure status employed by the Board of Education of the Borough of Paramus, hereinafter "Board," alleges that the Board's action taken on August 28, 1973, pursuant to N.J.S.A. 18A:16-2 et seq., ordering petitioner to submit to a psychiatric examination, was and is violative of petitioner's rights under the First Amendment of the United States Constitution, was unreasonably based upon insuffiicent evidence, and was procedurally defective.

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The Board answers that its action is reasonable and proper in all respects, does not violate any of petitioner's rights, and further denies each of petitioner's allegations.

Petitioner requests that the Commissioner of Education reverse the Board's action ordering petitioner to submit to a psychiatric examination on the grounds that such order violates petitioner's constitutional rights, the Board's procedure was fatally defective, and its order is unreasonable in that it is not based upon sufficient evidence to support its determination.

At a conference held January 16, 1974, the parties stipulated a number of items of documentary evidence. Petitioner submitted a Motion for Summary Judgment, and a tentative date of January 30, 1974, was set down for oral argument on the Motion. Oral argument was held April 15, 1974, and Briefs were filed by the parties. The entire record in this matter, including the transcript of the oral argument, is now before the Commissioner for determination.

It is necessary to point out that, subsequent to petitioner's filing of the instant Petition of Appeal, the Board certified tenure charges against Petitioner Gish to the Commissioner, pursuant to N.J.S.A. 18A:6-10 et seq. The purported actions of petitioner which form the basis of the tenure charges are essentially similar to the reasons stated by the Board for its requiring that petitioner submit to a psychiatric examination. The Board's tenure charges additionally include the charge that John Gish failed to comply with the Board's August 28, 1973 order to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2 et seq. The conference of counsel *In the Matter of the Tenure Hearing of John Gish, School Dis-*

trict of the Borough of Paramus, Bergen County, was held concurrently with the conference in the instant matter on January 16, 1974, because of the related nature of these two cases. Petitioner Gish is represented by other counsel in the tenure case wherein he is the respondent. In the tenure case, Gish filed a Motion for Summary Judgment, and it was agreed by the parties that oral argument on that Motion would be heard following the oral argument on the Motion in the instant matter. This procedure was followed, and oral argument on John Gish's Motion for Summary Judgment in the tenure case was held July 22, 1974. The Commissioner's determination *In the Matter of the Tenure Hearing of John Gish, School District of the Borough of Paramus,* 1974 *S.L.D* 1168, decided on the same day as the instant matter, will be discussed, *post.*

The following relevant material facts are undisputed and illustrate the gensis of the matter herein controverted before the Commissioner:

Petitioner Gish has been employed by the Board as a teacher in Paramus High School since 1965. On or about June 14, 1972, Petitioner Gish assumed the office of president of the Gay Activist Alliance of New Jersey, hereinafter "Gay Alliance," an organization dedicated to the cause of the "Gay Liberation Movement." According to petitioner, the Gay Alliance is an organization dedicated to the elimination of discrimination against gay persons, including homosexuals. Petitioner's position as president of the Gay Alliance was publicly announced and covered by national and local news media.

The Board adopted a resolution on July 10, 1972, directing petitioner to undergo a pyschiatric examination. That resolution reads as follows:

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"WHEREAS, the Board has authorized the Superintendent and Board Attorney to consult with Dr. Richard Roukema, the Board's consulting psychiatrist, as to his opinion as to whether the overt and public behavior of John Gish, during the period of June 14, 1972 through the present, indicates a strong possibility of potential pychological harm to students of the Paramus School District as the result of their continued association with Mr. Gish; and

"WHEREAS, Dr. Richard Roukema has indicated his opinion that such overt and public behavior on the part of John Gish does indicate a strong possibility of potential harm to the students of the Paramus School District as the result of their continued association with him; and

"WHEREAS, based upon the investigation made by the Superintendent and the Board Attorney and the opinion of Dr. Roukema, the actions of John Gish, in the judgment of the Board, constitute evidence of deviation from normal mental health;

"RESOLVED that John Gish be required to undergo a psychiatric examination by Dr. Richard Roukema pursuant to the provisions of N.J.S.A. 18A:16-2 and 3." (Exhibit R-1)

On August 10, 1972, petitioner filed suit challenging the constitutionality of N.J.S.A. 18A:16-2, and the New Jersey Superior Court, Chancery Division, issued a temporary restraining order against implementation of the statute. The opinion of the Court in *James V. Kochman and John N. Gish, Jr. et al.* v. *Keansburg Board of Education*

and Paramus Board of Education et al., 124 N.J. Super. 203 (Chan. Div. 1973) will be considered, *post.*

The Board informed petitioner by letter dated August 25, 1972, that for the 1972-73 academic year he was being transferred to the Board's administrative offices from his teaching position in the high school. This action was taken by the Board in accordance with its position set forth in the resolution adopted July 10, 1972.

On May 31, 1973, the opinion of Judge Lane, J.S.C., was rendered in *Kochman* v. *Keansburg, supra,* holding that the statute N.J.S.A. 18A:16-2 is constitutional.

By letter dated June 7, 1973, addressed to petitioner by the Superintendent of Schools, petitioner was given a copy of the Board's July 10, 1972 resolution and a statement of reasons why the Board was requiring him to undergo a psychiatric examination. This letter is reproduced in its entirety as follows:

> "Please be advised that, pursuant to N.J.S.A. 18A: 16-2 and 18A:16-3, a copy of which is attached hereto, the Board of Education adopted, at its regular meeting held on July 10, 1972, a Resolution requiring you to undergo a psychiatric examination. A copy of said Resolution is attached hereto.
>
> "The reasons for the requiring of such an examination are as follows: Your behavior during the period of June 14, 1972 to July 10, 1972, including but not limited to your assumption of the Presidency of the Gay Activist Alliance of New Jersey on June 14, 1972, your statements to the Record published in its June 15, 1972 edition, that 'I'm doing this so that educators can start educating the public about human differences and alternative life

styles . . . This action shouldn't hurt the teaching profession's image. Instead it will bring the profession closer to the realm of reality . . . Most gay teachers are known to be gay by their students and Board of Education. Just as long as nothing is said the system tolerates them. However, I'm fed up with lying to them;' your sponsorship of the formation of a Gay Teachers Caucus at the annual convention of the National Education Association, held on June 26, 1972 in Atlantic City, New Jersey; your causing to be published in the New York Times on July 2, 1972 an article entitled 'Gay Teachers: Looking for Recognition;' your causing to be published in the Record on July 7, 1972 an article entitled 'Out of the Classroom Closet, Gay Teacher Speaks Up;' your causing to be published in the Newark Evening News on June 28, 1972 an article entitled 'Gay Survey Suggested;' and your causing to be published in the Record on June 29, 1972 an article entitled 'Homosexual Asks Poll' raised, in the discretion of the Board of Education, and in the opinion of Dr. Roukema, the Board of Education's consulting psychiatrist, a significant possibility of harmful, significant deviation from mental health which would affect your ability to teach, discipline or associate with the children subject to your control, and which would have the tendency to result in a strong possibility of potential psychological harm to children as a result of their continued association with you.

"Based on the foregoing, the Board re-affirms its resolution of July 10th and hereby directs that you submit to a psychiatric examination pursuant to

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N.J.S.A. 18A:16-2. You are hereby advised that you have a right to request a hearing before the Board of Education concerning the Resolution described above and the statement of reasons above. You are also hereby advised that, pursuant to N.J.S.A. 18A:16-3, you have a right to have the examination made by a physician of your own choosing, approved by the Board of Education, in which case said examination shall be made at your expense.

"If you do not wish to choose your own physician and do not wish to request a hearing from the Board of Education, please contact me at your earliest convenience to arrange for the scheduling of a psychiatric examination by a Board appointed physician. Please advise me promptly of your intentions." (Exhibit R-2)

The Board adopted a second resolution on June 28, 1973, concerning Petitioner Gish. This resolution reads as follows:

"WHEREAS, the Board, by Resolution dated July 10, 1972, resolved, based upon the investigation made by the Superintendent and the Board Attorney and the opinion of Dr. Roukema, the Board's consulting psychiatrist, that John Gish be required to undergo a psychiatric examination pursuant to the provisions of NJSA [sic] 18A:16-2 and 3; and

"WHEREAS, it is the opinion of the Board that it is in the best interests of John Gish that such examination be conducted by a psychiatrist totally independent of the overt and public behavior of John Gish during the period from June 14, 1972 to July

10, 1972, which behavior resulted in the aforementention Resolution;

"RESOLVED that so much of the Resolution of the Board dated July 10, 1972, which authorized Dr. Richard Roukema to conduct the psychiatric examination of John Gish, be, and the same hereby is, rescinded; and

"FURTHER RESOLVED that said examination of John Gish be conducted by Dr. Edward Lowell." (Exhibit R-7)

By letter dated August 9, 1973, addressed to Petitioner Gish from the Assistant Superintendent of Schools, petitioner [sic] was given additional reasons why the Board was requiring him to undergo a psychiatric examination. This letter reads as follows:

"In accordance with the procedures outlined in a directive dated February 2, 1972 from the Assistant Commissioner of Education to all County Superintendents of Schools, and in accordance with the directives contained in the opinion of The Honorable Merritt Lane in the case of Kochman et al v. Keansberg (sic) Board of Education, et al dated May 31, 1973, both of which require that a statement of reason or reasons be given a teacher in connection with any request for a psychiatric examination, the Board of Education wishes to inform you that in addition to those reasons set forth in a letter dated June 7, 1973 from Paul A. Shelly, Superintendent of Schools, to you, the following represent additional reasons for requiring you to undergo a psychiatric examination pursuant to N.J. S.A. 18A:16-2 and 3 and pursuant to resolutions of the Board of Education adopted on July 10, 1972

and June 28, 1973: Your behavior during the period of July 10, 1972 to the present, including but not limited to your course of conduct in permitting students and graduates of Paramus High School to visit with you during working hours in your office contrary to the directives of your immediate supervisor, Assistant Superintendnt of Schools Galinsky; your course of conduct in using the phone and facilities of your office to promote the cause of the Gay Liberation Movement, including conversations during May of 1973, overheard by Superintendent of Schools Paul A. Shelly in which you attempted to organize a 'Hold Hands Demonstration,' sponsored by the Gay Activist Alliance of New Jersey, on the George Washington Bridge on May 6, 1973, and in which you advised an individual concerning the placement of a child in a camp for homosexual children; your organization of and participation in the 'Hold Hands Demonstration' on the George Washington Bridge on May 6, 1973; your unauthorized distribution of a flyer at a dinner meeting of the members of System Training for Educational Participation (STEP), which flyer suggested, among other things, that STEP set up mechanisms to create motivation for the understanding of sexism and foster growth in terms of sexual awareness and alternatives, and your speech at said meeting, at which you stated 'you know my position and I strongly urge that you pass a motion supporting my cause;' your causing to be published on behalf of the Gay Activist Alliance of New Jersey as publicly promoting the cause of the Gay Liberation Movement, a flyer reprint of an article originally published in the Record on June 15, 1972, which

> article dealt with your participation in a Gay Teachers' Caucus at the National Educational Association in Atlantic City; and your suggestion to Assistant Superintendent of Schools Galinsky that 'it wouldn't be a bad idea of there was a high school 'Gay Club' [sic];' and your course of conduct in engaging in speaking engagements to promote the cause of the Gay Liberation Movement at, among other schools, Middlebury College and Rutgers University." (Exhibit R-3)

The Board met privately with Petitioner Gish on August 9, 1973 at which time petitioner was given the letter dated August 9, 1973, containing the additional statement of reasons. (R-3) Petitioner was represented by counsel at this meeting. The transcript of the August 9, 1973 session discloses that the Board had met that same evening in private session and authorized the letter containing the additional statement of reasons. (Tr. I-12) The Board also informed petitioner and his counsel that it would set another date for review of the additional reasons. It was mutually agreed that the Board would meet again on August 22, 1973 with petitioner and his counsel. (Tr. I-11)

At the August 9, 1973 meeting, counsel for petitioner argued that the Board's consulting psychiatrist, Dr. Roukema, must be available for cross-examination. (Tr. I-14-15) The Board declined to produce the psychiatrist. It appears that a statement of hypothetical facts had been presented to Dr. Roukema, and he had based his opinion on such facts. (Tr. I-20-21) When asked whether petitioner disputed the facts set forth in the hypothetical statement, petitioner's counsel replied that petitioner disputed that he had caused certain newspaper articles to be

published. (Tr. I-21) Petitioner did not dispute the statements in the Superintendent's letter (R-2) or the accuracy of the newspaper articles. (Tr. I-21) The record of the August 9, 1973 meeting discloses that petitioner's counsel presented a legal argument to the effect that the Board's reasons did not provide a basis for subjecting petitioner to a psychiatric examination. Also, counsel argued that petitioner's public advocacy of an unpopular cause is protected by his right to freedom of speech and freedom of association. (Tr. I-13-30)

Prior to the Board's August 22, 1973 meeting with petitioner, the Board presented a statement of hypothetical facts to another psychiatrist, Dr. Edward H. Lowell, which was dated August 14, 1973.

This statement of hypothetical facts is quoted *in toto* as follows:

> "An English teacher of Paramus High School, John Gish, who was born on April 1, 1937 in Peekskill, New York, attended the Fair Lawn Public Schools (K through 12), received a BA Degree from Seton Hall University, served the United States Army Security Agency from August 1956 to June 1959, has been in the employ of the Paramus Board of Education since September of 1965, has, during that period, received excellent evaluations as an English teacher, has during that period, not been involved in any derelictions of duty in his capacity as a teacher; but who, as of Wednesday, June 14, 1972, was elected as President of the Gay Activist Alliance of New Jersey and announced at a meeting attended by teacher representatives of the various schools in the Paramus School District that the

news of his appointment would be made public as of Thursday, June 15, 1972; who was quoted by The Record, a newspaper of countrywide circulation, in its June 15, 1972 edition, as stating 'I'm doing this so that educators can start educating the public about human differences and alternative life styles * * *;' 'This action shouldn't hurt the teaching profession's image. Instead it will bring the profession closer to the realm of reality.'; 'Most gay teachers are known to be gay or are assumed to be gay by their students and Boards of Education. Just as long as nothing is said, the system tolerates them. However, I'm fed up with lying to them.'; and who The Record reported as stating that the major aim of the Gay Teacher's (sic) Caucus to be held at the National Education Association Convention beginning June 26, 1972 in Atlantic City was to have homosexuals included in any reference to ethnic minority groups in a new National Education Association constitution to be ratified at the convention; and who caused there to be published in the New York Times on July 2, 1972 an article entitled 'Gay Teachers: Looking for Recognition,' an article in The Record on July 7, 1972 entitled 'Out of the Classroom Closet, Gay Teacher Speaks Up,' an article in the Newark Evening News on June 28, 1972 entitled 'Gay Survey Suggested,' and an article in the Record on June 19, 1972 entitled 'Homosexual Asks Poll;' who (during the 1972-1973 school year) was assigned to the administrative offices of the District and was informed that he was not to have contact with students and whose duties during that school year did not require contact with students; who (during the

1972-1973 school year) engaged in a course of conduct permitting students and graduates of Paramus High School to visit with him during working hours in his office, contrary to the directives of his immediate supervisor, Assistant Superintendent of Schools Galinsky; who (during the 1972-1973 school year) engaged in a course of conduct using the phone and facilities in his office to promote the cause of the Gay Liberation Movement, including phone conversations during May of 1973, overheard by Superintendent of Schools Paul A. Shelly, in which he worked at organizing a 'Hold Hands Demonstration,' sponsored by the Gay Activist Alliance of New Jersey, on the George Washington Bridge on May 6, 1973, and in which he advised an individual concerning the placement of a child with effeminate tendencies in an appropriate camp; who organized and participated in the 'Hold Hands Demonstration' on the George Washington Bridge on May 6, 1973; who (during the 1972-1973 school year) distributed, without authority, a flyer at a dinner meeting of the members of System Training for Educational Participation (STEP), which flyer suggested, among other things, that STEP set up mechanisms to create motivation for the understanding of sexism and foster growth in terms of sexual awareness and alternatives, and who gave a speech at said meeting, at which he stated 'You know my position and I strongly urge that you pass a motion supporting my cause;' who caused to be published on behalf of the Gay Activist Alliance of New Jersey as publicity promoting the cause of the Gay Liberation Movement, a flyer reprint of an article originally

published in The Record on June 15, 1972, which article dealt with his participation in a Gay Teacher Caucus at the National Education Association Convention in Atlantic City; and who (during the 1972-1973 school year) suggested to Assistant Superintendent of Schools Galinsky that 'it wouldn't be a bad idea if there was a high school 'Gay Club' [sic];' and who (during the 1972-1973 school year) engaged in a course of conduct in engaging in speaking engagements to promote the cause of the Gay Liberation Movement at, among other schools, Middlebury College and Rutgers University; and who, on July 25, 1973, at an arbitration hearing, admitted stating to a reporter for The Record, on or about July 10, 1972: 'I am a gay person. That is a person who has full bodily and psychological integrity'; who at said hearing confirmed what he had said to a reporter for The Record on or about July 10, 1972 namely that gay people include homosexuals, bisexuals and heterosexuals; who at said hearing elaborated on the meaning of the definition of a gay person, stating in effect that a gay person is a person who believes in total freedom of the use of one's body on a consensual basis in homosexual, bisexual and/or heterosexual relationships." (Exhibit R-4)

This foregoing statement of hypothetical facts is essentially a composite of the Board's letters containing its statements of reasons, dated June 7, 1973 (R-2) and August 9, 1973. (R-3)

After reviewing the above statement of hypothetical facts, Dr. Lowell wrote the following letter, dated August 16, 1973, to the Superintendent of Schools:

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> "I have carefully examined the Statement of Hypothetical Facts, attached hereto, which you presented to me in a meeting in my office on August 15, 1973, which meeting was also attended by Joseph A. Rizzi, Esq., attorney for the Board of Education:
>
> "Based upon an analysis of those hypothetical facts, and assuming the essential truth of those facts, I can state, with a reasonable degree of medical certainty, that the subject, John Gish, does show evidence of deviation from normal and mental health." (Exhibit R-5)

At the private meeting of the Board with petitioner on August 22, 1973, the Board presented to petitioner's counsel the statement of hypothetical facts dated August 14, 1973 (R-4), which had been presented to the second psychiatrist, and also presented the letter reply from Dr. Lowell dated August 16, 1973. (R-5) Petitioner's counsel argued again that both psychiatrists must be produced by the Board for cross-examination since their respective opinions were being relied upon by the Board in its determination that petitioner submit to an examination. Petitioner's counsel also argued that the qualifications and credentials of the psychiatrists should be the subject of questioning, and petitioner should be afforded opportunity to present his own expert witnesses in response. (Tr. II-24) Petitioner stated that the bare conclusions given by the Board's psychiatrists do not state the type of pathology indicated by the statement of hypothetical facts or the type of harm which might result from the alleged mental defect. (Tr. II-24)

Petitioner's counsel reviewed the seven allegations in the Board's statement of reasons dated August 9, 1973

(R-3) and stated that four of the seven relate to petitioner's efforts to advocate a cause in which he believes, by speech, writing or association. (Tr. II-25-26) Petitioner's counsel argued that two other allegations, in addition to the four, are concerned with alleged infractions of rules or orders which, if true, might be the basis for a reprimand or other disciplinary action.

The Board corrected the statement in its letter dated August 9, 1973 (R-3), regarding "the placement of a child in a camp for homosexual children." According to the Board, the statement should read as set forth in the statement of hypothetical facts dated August 14, 1973 (R-4), which refers to the "* * * placement of a child with effeminate tendencies in an appropriate camp * * *." Petitioner produced a letter dated August 21, 1973, addressed to him by a rabbi with whom the telephone conversation concerning the placement of a child was held. This letter, which is entered in evidence (P-4), is supportive of petitioner.

In regard to the allegation that petitioner had stated to the Assistant Superintendent that "* * * it wouldn't be a bad idea if there was a high school 'Gay Club' * * *," petitioner stated at the August 22, 1973 meeting that this comment had been made in jest by the Assistant Superintendent, and in repartee petitioner had jokingly replied "* * * 'Hey, I never thought of it but it might not be a bad idea.' * * *" (Tr. II-34) According to petitioner, he had no intention to organize a Gay Club in the high school. (Tr. II-34) The Board did not refute petitioner's version of this conversation; therefore, it must be concluded that the facts are as petitioner related them.

Following this second meeting of the Board with petitioner, the Superintendent sent a letter under date of

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August 28, 1973 to petitioner which directed him to undergo a psychiatric examination. This letter reads as follows:

> "Please be advised that, based upon your conduct during the period from June 14, 1972 to August 9, 1973, which conduct was set forth in the Statement of Reasons dated June 7, 1973 and August 9, 1973, copies of which were furnished to you and to counsel on your behalf, and based upon the opinion of Dr. Richard Roukema, paraphrased in the Resolution of the Board of Education dated July 10, 1972, and based upon the opinion of Dr. Edward H. Lowell, contained in his letter dated August 16, 1973, a copy of which was furnished to counsel on your behalf, and based upon a consideration of the evidence presented by counsel on your behalf at hearings before the Board of Education on August 9, 1973 and August 22, 1973, the Board of Education has determined that your conduct during said period evidences a harmful, significant deviation from normal mental health affecting your ability to teach, discipline and associate with students of the Paramus Public Schools, and, accordingly, hereby orders you to undergo a psychiatric examination, pursuant to the terms of NJSA 18A:16-2 and 18A:16-3. Would you kindly contact the undersigned immediately so that we may arrange for the scheduling of the psychiatric examination." (Exhibit R-6)

Thereafter, the instant Petition of Appeal, dated September 4, 1973, was filed with the Commissioner on September 7, 1973.

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In his Petition of Appeal and Brief, petitioner sets forth a three-pronged attack upon the Board's action requiring him to undergo a psychiatric examination. The Commissioner will review each of petitioner's arguments. In the first instance, petitioner argues that the Board's action impermissibly infringes upon his First Amendment rights of free speech and free association. Throughout his argument, petitioner characterizes his actions, which are described in the two statements of reasons (R-2, R-3) as political activities. It is petitioner's view that he assumed the presidency of the Gay Alliance, which wages a political struggle against discrimination directed against gay persons, and on behalf of that organization he engaged in lawful demonstration, made statements and speeches, and sought to advance the political cause he espouses. All of these activities, says petitioner, are protected by the First Amendment to the United States Constitution. (Petitioner's Brief, at p. 6) In support of this argument, petitioner cites numerous cases decided by the United States Supreme Court, Court of Appeals, and District Court as follows: *Perry* v. *Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972); *Healy* v. *James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Russo* v. *Central School District No. 1,* 469 F. 2d 263 (2nd Cir. 1972), *cert. den.* 93 S. Ct. 1899 (1973); *James* v. *Board of Education,* 461 F. 2d 566 (2nd Cir. 1972); *Pred* v. *Board of Public Education,* 415 F. 2d 851 (5th Cir. 1969); *Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966); and *Hanover* v. *Northrup,* 325 F. Supp. 170 (D. Conn. 1970).

In the judgment of the Commissioner, it is not necessary to review each of the above-cited cases, which are well

known and deal with First Amendment rights. However, several points must be mentioned. In *Healy* v. *James, supra,* Mr. Justice Powell stated the following:

> "* * * At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker,* First Amendment rights must always be applied 'in light of the special characteristics of the * * * environment' in the particular case. *Ibid.* And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id.,* at 507, 89 S. Ct. at 737. * * *" (408 U.S. at 180, 92 S. Ct. at 2345-2346)

In his concurring opinion in *Healy* v. *James, supra,* Mr. Justice Rehnquist pointed out the distinction between the government acting as the administrator of a school and the government acting as a sovereign to enforce its criminal laws. In each capacity the government has different constitutional limitations. Mr. Justice Rehnquist stated that:

> "* * * Prior cases dealing with First Amendment rights are not fungible goods, and I think the doc-

> trine of these cases suggests two important distinctions. The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government up all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each. * * *" (408 U.S. at 203, 92 S. Ct. at 2357)

Mr. Justice Rehnquist quoted the Court in *Pickering* v. *Board of Education, supra,* wherein it was stated that:

> "* * * The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. * * *" (391 U.S. at 568, 88 S. Ct. at 1734)

As an example of a New Jersey case where the principles stated in *Pickering, supra,* were argued and distinguished, see *Pietrunti* v. *Board of Education of Brick Township,* 128 N.J. Super. 149 (App. Div. 1974), *cert. denied,* 65 N.J. 573 (1974).

In the instant matter, the Board's argument presumes that petitioner's actions are not solely political activities which are entitled to First Amendment protection. The Board states that as laymen of common intelligence and reason it collectively judges petitioner's actions as showing

evidence of harmful, significant deviation from normal mental health affecting petitioner's ability to teach, discipline or associate with the pupils subject to petitioner's control. Therefore, the Board asserts, petitioner has no inherent First Amendment protection to refuse to undergo a psychiatrist examination as provided by N.J.S.A. 18A:16-2.

The Commissioner, having considered the arguments set forth by both parties on the issue raised by petitioner, bases his determination on the following interpretation of law.

As was previously stated, the constitutionality of the statute, N.J.S.A. 18A:16-2, was challenged by petitioner immediately following the Board's adoption of the July 10, 1972 resolution (R-1) ordering petitioner to undergo a psychiatric examination, and the Court held the statute constitutional. *Kochman and Gish et al.* v. *Keansburg Board of Education and Paramus Board of Education et al., supra.*

In his opinion, Judge Lane construed the term "deviation from normal * * * mental health," as used in N.J.S.A. 18A:16-2 to mean:

> "* * * harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district. * * *" (124 N.J. Super. at 212)

Judge Lane explained the purpose of the statute in the following terms:

> "* * * The legislature has delegated to boards of education the authority to determine whether a

teacher is fit to teach in general terms. These general terms were held in *Laba* v. *Newark Board of Education, supra,* 23 N.J. 364, to provide sufficient standards for application. In N.J.S.A. 18A: 16-2 the legislature has delegated to boards of education the power to request a teacher who shows evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district to submit to a psychiatric examination. As this court has construed the statute, it has delineated in as narrow terms as possible another area of unfitness which a teacher may evidence by his behavior. The legislature has, however, recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist. The grant of power to a board of education to require such an examination is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness, held proper in *Laba* v. *Newark Board of Education, supra,* 23 N.J. 364. The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest. This being so, the fact that the statute may intrude

upon a teacher's rights of association, expression and privacy does not render it unconstitutional. As interpreted by this court, the statute contains sufficient standards to guide the board's action and also offers individual teachers a sufficient indication of what behavior may result in board action. * * *" (124 N.J. Super. at 212-213)

Following the rendering of Judge Lane's opinion in *Kochman* v. *Keansburg, supra,* on May 31, 1973, the Board took the subsequent actions, *ante,* and states now that it took care to comply with the Court's opinion. The Board asserts that it proceeded reasonably, cautiously, and prudently before it finally determined to order petitioner to undergo a psychiatric examination. (Tr. III-22, 34) The Board further states that it presented statements of hypothetical facts to psychiatrists and sought their opinions as to these hypothetical facts, merely to test its own independent judgment that petitioner's conduct was such that an examination was in order. In the Board's view, the response of the psychiatrist assisted the Board by adding some objective medical advice which did buttress the Board's lay judgment that petitioner's action met the definition of deviation from normal mental health as defined in *Kochman.*

Since the actions of Petitioner Gish, as described in the Board's statements of reasons (R-2, R-3) are also the subject of tenure charges, the Commissioner is constrained at this juncture, from either characterizing such actions or discussing the merits of the charges which arise from such actions. The narrow consideration is simply whether the Board's action in this case should be sustained or set aside, based upon the stated facts and the governing law.

Appendix C

The Commissioner has carefully reviewed the arguments addressed to this precise issue and finds and determines that the Board's action directing petitioner to undergo a psychiatric examination does not, under the circumstances of this case, constitute either an abuse of discretion or a violation of petitioner's constitutional rights. The Board's judgment is one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils. *Kochman* v. *Keansburg, supra;* N.J.S.A. 18A:16-2. The Board's determination was made with full knowledge of the definition of the term "deviation from normal * * * mental health" made by the Court, and the Board acted with careful deliberation. The Commissioner cannot agree that petitioner's actions as previously described must be considered as purely political and thus cloaked with the protection of the First Amendment.

The second issue raised by petitioner in this matter is whether petitioner's rights to due process were violated by the Board, particularly as the result of the procedures which were followed when the Board, on two occasions, gave petitioner the right to be heard.

Petitioner asserts that the Board's failure to present the two psychiatrists for cross-examination at the meetings held August 9, 1973, and August 22, 1973, impermissibly infringed upon his right to due process. Petitioner avers that the two psychiatrists were adverse witnesses because each had rendered an opinion based upon a statement of hypothetical facts. Petitioner argues that the Sixth Amendment to the U.S. Constitution, made obligatory

upon the States by the Fourteenth Amendment, explicitly declares that the right of an accused to confront the witnesses against him is fundamental, citing *Dutton* v. *Evans*, 400 U.S. 74, 9 S. Ct. 210, 27 L. Ed. 2d 213 (1970) and *State* v. *King*, 59 N.J. 525, 284 A. 2d 350 (1970). Petitioner further argues that the fundamental right of procedural due process requires that in civil, as well as criminal, proceedings there must be confrontation and cross-examination of adverse witnesses, relying upon *Goldberg* v. *Kelly*, 297 U.S. 254, 90 S. Ct. 1011, 23 L. Ed. 2d 287 (1970). Petitioner also cites the following cases to buttress his position: *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 103-104, 83 S. Ct. 1175, 1180-1181, 10 L. Ed. 2d 224 (1963), a case involving denial of admission to the New York State Bar; *Greene* v. *Mc Elroy*, 360 U.S. 474, 496-497, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959), a case involving revocation of a government contractor's employee's security clearance; *Davis* v. *Davis*, 103 N.J. Super. 284 (App. Div. 1968), 274 A. 2d 139, a case wherein a wife sued for child support; *Kelly* v. *Sterr*, 119 N.J. Super. 272 (App. Div. 1972), 291 A. 2d 148, a disciplinary proceeding against a State policeman involving suspension without pay; and *Tibbs* v. *Board of Education, Township of Franklin*, 114 N.J. Super. 287 (App. Div. 1971), 284 A. 2d 179, aff'd 59 N.J. 506 (1971), 284 A. 2d 179, a case involving an expulsion hearing for a high school pupil by a local board of education.

In *Goldberg* v. *Kelly, supra*, the United States Supreme Court determined that welfare recipients in New York City could not be terminated from the receipt of benefits without a hearing at which they could confront and cross-examine witnesses relied on by the department of welfare.

Appendix C

The Court cited its previous ruling in *Greene* v. *McElroy, supra,* that due process requires an opportunity to confront and cross-examine adverse witnesses as follows:

> "* * * Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny." (360 U.S. 474, 496-497, 79 S. Ct. 1400, 1413 3 L. Ed. 2d 1377 (1959))

The Commissioner takes this as clear law which the New Jersey Supreme Court has applied to hearings before a local board of education for the expulsion of pupils. See *Tibbs* v. *Board of Education of Franklin Township, supra.*

In the instant matter, there are specific circumstances which must be closely examined. In the first instance,

there appears to be no substantial dispute over the relevant, material facts as regards Petitioner Gish's actions, statements, or speeches which form the basis of the Board's reasons. Petitioner does contest that he caused certain newspaper articles to be printed. This point is not particularly relevant at this stage of the proceedings. Petitioner does not deny the accuracy of the content of the newspaper articles, insofar as they quote or recite his statements. The Board does not dispute petitioner's version of his conversation with the Assistant Superintendent regarding a "Gay Club," *ante,* and, as was previously stated, the Commissioner accepts petitioner's version of the conversation. The Commissioner can find no other dispute concerning the facts in the record before him.

Next, the Commissioner must consider the nature of the hearing which must be provided to petitioner, or any employee, as part of the necessary procedures for implementation of N.J.S.A. 18A:16-2 *et seq.* In *Kochman* v. *Keansburg, supra,* the Court quoted a directive dated February 2, 1972 from the Assistant Commissioner of Education to all County Superintendents which states:

> "* * * 'N.J.S.A. 18A:16-2 permits a board of education to require individual psychiatric or physical examination of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical (communicable disease) or mental health.
>
> "It is important that boards be advised, when necessary, that this statute is construed to mean that any individual of whom such an examination is required should be given the reason or reasons therefor by the board and also the right to be heard by

the board before the statute is applied.' * * *" (124 N.J. Super. at 213)

In reviewing the statement, the Court stated the following:

"* * * Before a teacher is ordered to submit to a psychiatric examination, he is entitled to a statement of the reasons for such examination, * * * and to a hearing, if requested * * *. The procedure prescribed in the directive if followed would provide adequate due process to teachers. However, the directive is precatory and not mandatory in its terms. The requirement of a statement of reasons and a hearing, if requested, is constitutionally mandated. * * *" (124 N.J. Super. at 213)

Following the statement of reasons and a hearing, a teacher or other board employee has the right to appeal to the Commissioner from an order for a psychiatric examination, and thereafter to appeal from an adverse decision by the Commissioner to the State Board of Education under N.J.S.A. 18A:6-27.

Given these procedures, the Court stated the following:

"* * * With such procedural safeguards the application of N.J.S.A. 18A:16-2 will not violate due process. * * *" (124 N.J. Super. at 214)

In the Commissioner's judgment, when reasons are provided by a local board of education and a hearing is scheduled, certain procedures must be followed. Adequate written notice of the hearing must be provided to insure the individual sufficient time to prepare his presentation. In

addition to the written statement of reasons, the ideal procedure would be to have the reasons verbally explained to the employee prior to his appearance before the board. The individual is entitled to be represented by counsel or a person of his own choice before the board, and must be permitted to present witnesses on his behalf. If written statements or affidavits of witnesses are relied upon by the board in making its independent determination, the individual is entitled to receive copies of such signed statements upon request, and prior to the hearing. Such a hearing must be private because the hearing itself is actually preliminary. The appearance by the teacher is expressly to dissuade the board from requiring him/her to undergo a psychiatric examination. It is logical to assume that, once a board has furnished reasons to a teaching staff member or other employee, and upon request is giving the individual an opportunity to be heard, the board has already made a tentative determination that a psychiatric examination is necessary. But the individual could conceivably change such a determination by convincing the members of the board that they had made an incorrect judgment. Should this result, the entire matter would end at that point. For this important reason an individual is entitled to privacy and confidentiality during such a proceeding.

The Commissioner does not believe that this preliminary hearing by a local board of education should contain all of the formal panoply of a full adversary hearing. It has been pointed out that, when an individual challenges a board's determination for a psychiatric examination on whatever grounds, by filing a formal petition of appeal with the Commissioner, the proceedings then become fully adversary with all the elements of due process. Following

the filing of a Petition and Answer, a pre-hearing conference is held. The issues are defined and procedures are determined. If a fact-finding hearing is necessary, witnesses may be subpoenaed to testify and are submitted to cross-examination. The final determination of the Commissioner may be appealed by either party to the State Board of Education. N.J.S.A. 18A:6-27.

Given the extensive adversary procedures with full due process which automatically come into play before the Commissioner, it does not appear logical to the Commissioner that the identical procedures should be necessary or even advantageous to either party at the preliminary stage of a hearing before the board. It must be borne in mind that this entire preliminary procedure is an administrative one conducted and controlled by boards of five, seven, or nine lay citizens ordinarily unfamiliar with detailed legal procedures.

The procedure whereby a teaching staff member is entitled to an appearance before a local board of education prior to certain action by such board is not unfamiliar. In the case of *Charles Coniglio* v. *Board of Education of the Township of Teaneck, Bergen County,* 1973 S.L.D. 449, the Commissioner reviewed numerous cases which involved the withholding of salary increments. in *Coniglio, supra,* the Commissioner pointed out his previous determination in *J. Michael Fitzpatrick* v. *Board of Education of the Borough of Montvale, Bergen County,* 1969 S.L.D. 4, wherein he stated the following:

> "* * * The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner

> which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous. * * * (at p. 7)

In the judgment of the Commissioner, the above holding in *Fitzpatrick, supra,* remains a reasonable requirement, even though the Commissioner's previous holding, in several cases, that local boards must adopt a salary policy in order to withhold increments, has been overturned by *Westwood Education Association* v. *Board of Education of Westwood Regional School District,* Docket #A-261-73, New Jersey Superior Court, Appellate Division, decided June 21, 1974. See also *Mary C. Donaldson* v. *Board of Education of the City of North Wildwood, Cape May County,* 65 N.J. 236 (1974).

Assuming *arguendo* that an employee has undergone a psychiatric examination and the results are considered by

the board as sufficient to make him ineligible for further service until proof of recovery, satisfactory to the board, is furnished, as required by N.J.S.A. 18A:16-4, the individual may appeal that board determination to the Commissioner, and again a full adversary proceeding would result. Given all of the reasons stated above, the Commissioner believes that the hearing requirements hereinbefore enumerated will provide fair play and adequate due process under N.J.S.A. 18A:16-2.

In the matter herein controverted, the Commissioner finds and so holds that the Board's procedures did provide adequate due process safeguards for petitioner. The Board did make its own judgment that petitioner should undergo a psychiatric examination, and although it did secure a reaction from two psychiatrists which probably reassured the Board members of the correctness of their own judgment, the Board did not wholly rely upon the psychiatrists' responses to the hypothetical statement of facts as the basis for its judgment, as the chronology of events shows. Nor are the facts upon which the Board's determination was made in dispute. Under these circumstances, there appears to be no significant defect from the fact that the psychiatrists did not testify in person nor submit to cross-examination.

The Commissioner will next consider petitioner's argument that the decision reached by the Board was unsupported by adequate evidence. Petitioner claims that the Board relied upon the conclusory individual medical statements by two psychiatrists, and that the persons making the statements were not available for cross-examination. According to petitioner, the statements do not attempt to explain in what way the political activities of petitioner

demonstrate significant deviation from normal mental health, do not explain what actions in particular demonstrate such deviation, nor explain the nature of the deviation and describe the way such deviation might harm school children. Petitioner asserts that the Board presented no evidence to support its bare allegations.

As the Court pointed out in *Kochman* v. *Keansburg, supra,* the Legislature has delegated to local boards of education the authority to determine whether a teacher is fit to teach in general terms and, under N.J.S.A. 18A:16-2, the power to request a teacher who shows evidence of harmful significant deviation from normal mental health to submit to a psychiatric examination. The Court further stated the following, which was previously quoted, but bears repeating:

> "* * * The legislature has, however, recognized that although a board of education may observe signs of what is considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist. * * *" (124 N.J. Super. at 212)

At this point in petitioner's case, no psychiatric examination has been conducted, and the Board is precisely at the point described above in the words of the Court. Given certain actions by petitioner, the Board has judged these actions as signs of what it considers a harmful, significant deviation. In *Kochman, supra,* the Court further stated that:

> "* * * The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who

> have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest. * * *" (124 N.J. Super. at 212)

As the Commissioner has hereinbefore stated, he finds and holds that the Board's judgment is reasonable, given all the circumstances of the instant matter.

The Board opposes petitioner's Motion for Summary Judgment in this matter, and requests the Commissioner to proceed to a plenary hearing. The purpose of such a hearing is to determine the facts. In the Commissioner's judgment the facts are essentially undisputed as previously stated, and therefore the Commissioner can find no necessity for a fact-finding hearing at this juncture. If the facts were in dispute, the Commissioner would immediately proceed to a full hearing in this matter, but this clearly is not the situation as disclosed by the record before him.

Accordingly, for the reasons stated, petitioner's Motion for Summary Judgment is denied. The Commissioner orders petitioner to submit to a psychiatric examination in accordance with N.J.S.A. 18A:16-2, and 3, and the Board's directive dated August 28, 1973. (R-6)

On this same date, the Commissioner has issued an Order, *In the Matter of the Tenure Hearing of John Gish, School District of the Borough of Paramus, Bergen County,* setting aside, without prejudice, the tenure charges certified to the Commissioner by the Board. That Order reinstates petitioner to his position of employment, with full back salary, pending a final determination of peti-

tioner's status after the psychiatric examination has been completed and the results reported to and reviewed by the Board.

COMMISSIONER OF EDUCATION

December 2, 1974

Pending before State Board of Education

APPENDIX D

Dissent from Law Committee of the New Jersey State Board of Education, dated May 7, 1975

MEMORANDUM

Date: May 7, 1975

To: State Board of Education

From: Bryant George

Dissent From Law Committee Recommendation In The Case Of Gish Vs. The Board Of Education Of Paramus

The Chronology of This Case:

(1) Mr. Gish taught in the Paramus District 1965-1972 with distinction, he has good evaluations, the parents and students liked him, his classes were popular, he is tenured; (2) About June, 1972 Mr. Gish assumed the Presidency of the New Jersey Gay Activist Alliance, an organization dedicated to the elimination of discrimination against "gay" persons including homosexuals. He organized a "gay" caucus at the NEA Convention and participated in other political activities to promote the securing of full citizenship rights for "gay" persons; (3) July 26, 1972 Paramus Board ordered him to undergo a psychiatric examination to see if he was insane; (4) Gish filed suit challenging the constitutionality of N.J.S.A. 18A:16-2; (5) Paramus Board was enjoined from forcing Gish to have this examination. The Board in turn transferred him from a classroom to administrative offices, subsequently restricting him from use of the school cafeteria and limiting his contact and communication with teachers and pupils

in the school district; (6) September 13, 1972 The American Arbitration Association had before it only the issue of the territorial and communication restriction. The Arbitrator ruled, as quoted below, that the Board had acted improperly in this action and the restrictions were lifted.

> "In the absence of evidence that Mr. Gish sought student support for his views of the 'sexual revolution' in the classroom, the link between his political activities outside the classroom and the Board's fears of an adverse psychological effect upon students is too tenuous to justify his exclusion from high school facilities.
>
> In denying Mr. Gish access to facilities available to all high school faculty and employees in the administrative offices, the Board disciplined him solely for espousing a view looked upon askance by 'straight' society. The imposition of discipline for engaging in a protected, albeit not generally accepted political activity, absent proof of harm to students directly or indirectly, is a clear violation of (the contract)."

(Gish had a challenge on the psychiatric examination before the court, thus, did not submit this constitutional question for arbitration.) (7) In May, 1973 Judge Merritt Lane ruled on the case and Paramus Board pressed their order for the psychiatric examination. (8) August 9, 1973 the Paramus Board gave additional reasons for Mr. Gish to undergo psychiatric examination. Included in these reasons was a charge that he used the school telephones for non-official purposes; (9) Failing to get Gish to obey, they dismissed him. Gish appealed to the Commissioner

in two cases—one with respect to the demand for the examination and one on tenure (the latter case is not before us at this time). The Commissioner dismissed the appeal. The Law Committee by a majority vote upheld the Commissioner.

I Dissent

This is not a dissent based on the constitutionality of N.J.S.A. 18A:16-2. This is a dissent based upon a belief that the Paramus Board abused its discretion, and acted in an arbitrary and capricious manner. The Board over-reacted when confronted by a teacher clothed in the constitutional right to be different and who exercised that right outside the Paramus Board's premises. Paramus Board perverted N.J.S.A. 18A:16-2 by using their power to require a mental examination as a punishment rather than as a protection. Further, a search of the file does not show that the Paramus Board had, at the time of their decision, a view of deviant behavior on the part of Gish, nor evidence with respect to what kind of harm might result from his alleged mental defect. In the words of Judge Lane, deviant behavior is:

> "harmful significant deviation from mental health affecting the teacher's ability to teach, discipline, or associate with children of the age involved."

The foregoing leads me to believe that Paramus Board made its decision without due reflection and thereafter engaged in a panicked, punitive administrative action by improvisation. The Board apparently acted in this fashion simply because of this man's political activities. The file is innocent of any charge that Gish was "gay". Paramus

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Board, Gish, the Hearing Examiner and the Commissioner agree that being "gay" is not the issue in this case. Gish has stated that he wants to protect the rights of people who are "gay". This could have been construed by the Paramus Board in much the same manner as a white teacher being prosecuted for engaging in political activities on behalf of Blacks at Selma or elsewhere to protect their constitutional rights. The file reveals no charges of sexual misconduct, fondling of pupils or anyone else, suggestive sexual phrases in the classroom or on the school premises, and the like. If such charges had been made and sustained, a mental examination would clearly be in order to determine whether the teacher was "gay", lesbian, or was a teacher whose sexual mores follow what has hitherto been described as "conventional". Gish could certainly produce psychologists by the gaggle who would attest to his sanity. Thus, the case before this Board is one of a person espousing unpopular political views and a local Board using a tool designed to protect pupils and teachers (the "sanity" examination) to still this dissident voice. In *Kochman* v. *Keansburg,* Judge Lane upheld the law allowing local Boards of Education to require a psychiatric examination to be constitutional. He cautioned that:

> "state intrusion into constitutionally protected areas including the emerging right of privacy, must be founded on a compelling state interest which overrides private rights.
>
> N.J.S.A. 18A:16-2 is constitutional when a Board of Education intends to resort to it and requires a psychiatric examination, it must give the teacher a statement of its reasons and must afford the teacher a hearing if requested.

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> *It is conceded by the Commissioner that a teacher would have the right to appeal to him from an Order for a psychiatric examination under* N.J.S.A. 18A:-16-9 *and thereafter to appeal from an adverse decision by him to the State Board of Education under* N.J.S.A. 18A:6-27. *With such procedural safeguards, the application of* N.J.S.A. 18A:16-2 *will not violate due process."* (emphasis added)

My argument rests on the above underlined portions. This Board is asked to review the action of the Paramus Board with respect to "discretion". The use of discretion to demand a mental examination must have some rational relationship to a legitimate educational purpose or it must be shown that there is a clear and present danger to the health or safety of pupils or teachers. Neither of these common sense requirements are apparent in this decision-making process. Rather than looking to see if Paramus Board met the jots and tittles of the law, the State Board should review this case to determine if Paramus Board Board abused its discretion in application of the law.

State Board is the individual's guarantee that his constitutional rights will be protected in a matter of discretion.

The Commissioner stated that his purpose in reviewing the case is:

> "The Commissioner is constrained at this juncture from either characterizing such actions or discussing the merits of the charges which arise from such actions. *The narrow consideration is simply whether the Board's action in this case should be sustained or set aside, based upon the stated facts and the governing law."* (emphasis added)

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I believe the Commissioner understates his responsibility to the people of New Jersey when he rules there is but a "narrow consideration", i.e., to sustain or set aside the Board's action in this case where there is peril to the rights of a citizen.

A reading of the Commissioner's decision in this case does not reflect acknowledgement of the patchwork procedure followed by Paramus Board in this case and hardly seems to have received the rigorous scrutiny that the court relied upon in its judgment (holding N.J.S.A. 18A:16-2 to be constitutional). The purpose of this dissent is to focus the attention of the full Board on the Paramus Board's decision including the circumstances surrounding the decision and to make a determination whether Paramus Board abused its discretion. The Commissioner holds that he ruled against the petitioner because the facts in the case were undisputed and the law allows the Board to demand a mental examination. The fact on which this dissent rests is "discretion"—a matter about which I believe the Commissioner should be concerned, especially when an individual's standing in the community and his job rest on a discretionary decision. The Commissioner must diligently search to see if the local Board exercised its discretion fairly. The record seems clear that the Paramus Board acted hastily, had serious question about its action, but would not withdraw it. Rather, after the fact, their lingering doubts drove them to consult first a psychologist, psychiatrist and then another psychologist until they had gone to three mental health experts. It is difficult to believe that the local Board would have taken the same position if a teacher had engaged politically for or against a constitutional amendment to allow prayer in public schools, for or against

the E.R.A. or for further shopping center development on New Jersey's Route 4 in Paramus. In these situations would they have required the teacher who took these political positions to have a mental examination? No, this is a special kind of decision—a decision for punitive action against this person because his political views are unpopular and not acceptable to the majority of the Board. There is no criticism of his teaching, no charge that he is "gay". His views are out of harmony with ours so we want him tested to see if he is insane. Our system cannot sustain the shock waves of such a radical perversion of the discretion of a school board. If there were no Constitution and no Bill of Rights, then this case should be decided on a sense of fair play, of decent treatment of a fellow human being and an absence of any compelling state interest in stilling this man's voice. The Board appears to have overstepped by far its discretion. Public advocacy of an unpopular cause cannot be made the basis for the administrative use of N.J.S.A. 18A:16-2. I hold that the Board of Education, Borough of Paramus, acted rashly and in an impermissible and unwarranted manner in its handling of Mr. Gish's case and that we are obligated to reverse the decision of the Committee, the Commissioner and the Paramus Board.

Discussion

This dissent is being written in the year of our Bicentennial. While the Gish case is current, two hundred years ago this country was birthed by political dissenters. At that time, if there had been an uncontested administrative rule that you could examine the sanity of anyone who dissented, history at Concord, Bunker Hill and Tren-

ton would have been different—the British would have won by sending out a platoon of white coats—(Harley Street psychiatrists rather than divisions of red coats). For example, George Washington—a man who crosses a river in a boat standing up would have been viewed by the community in which he lived as a "little strange". The Harley Street mental health experts, surely would have found some way to make him better adjusted. Washington, Franklin, and others could have been examined, analyzed, and made to fit into the mold. Mr. Gish follows in their tradition of dissent. Mr. Gish exercises the same rights.

An additional charge made against Gish is that he made personal calls on the school's phone. I have studied the files of cases brought against many teachers and other school personnel in this state. This collateral charge is generally brought after the main charge is put. "The person charged used the phones paid for by the school board to make personal calls." What school district in New Jersey does not have its phones used for personal calls by administrators, teachers, and school maintenance personnel for setting up schedules for the Little League, getting the list of hymns for the Sunday church service, doing the basic work for fund raising for various excellent charitable organizations, and such other personal calls as, . . . "Charles, be sure to put the roast in the oven at 400 degrees before you leave home" . . ., appointments to have one's hair done, and the like? People use office and school phones to call the doctor, the dentist, the marriage counselor, and for outright political purposes. Such a charge is papering the file. While a strict reading of the administrative rule with respect to making personal phone calls on school phones may merit a men-

tal examination or dismissal (just as littering the school yard may merit the same), in the context of reality this is papering the file. ". . . Charles, did I say put the roast in at 400 degrees? I meant for you to put it in at 400 degrees for one hour and then reduce it to 200 degress before you leave. I want the outside seared and the inside pink . . ."

The Paramus Board's charge with respect to the personal phone calls is frivolous. Considering the many educational problems with which this state is beset, this charge is a waste of their time and ours and any discussion therefore is senseless.

APPENDIX E

United States Constitution and New Jersey Statutes

United States Constitution:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each States, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or

in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix E

New Jersey Statutes:

18A:6-9. Jurisdiction over controversies and disputes under school law not relating to higher education and rules of the commissioner and the state board

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

18A:16-2. Physical examinations; requirement

Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.

2A:164-28. Criminal conviction; expunging from record after 10 years; hearing; order; service; order of expungement; removal of disabilities; exceptions; fees

Appendix E

In all cases wherein a criminal conviction has been entered against any person [whereon sentence was suspended, or a fine imposed of not more than $1,000.00,*] and no subsequent conviction has been entered against such person, it shall be lawful after the lapse of 10 years from the date of such conviction *or 10 years after the date such person completed his term of imprisonment or was released from parole, whichever is later,* for the person so convicted to present a duly verified petition to the court wherein such conviction was entered, setting forth all the facts in the matter and praying for the relief provided for in this section.

Upon reading and filing such petition such court may by order fix a time, not less than 10 nor more than 30 days thereafter, for the hearing of the matter, a copy of which order shall be served in the usual manner upon the prosecutor of the county wherein such court is located, and upon the chief of police or other executive head of the police department of the municipality wherein said offense was committed, *and upon the Diagnostic Center at Menlo Park if such person was committed to that institution before sentencing,* within 5 days from the date of such order, and at the time so appointed the court shall hear the matter and if no material objection is made and no reason appears to the contrary, an order may be granted directing the clerk of such court to expunge from the records all evidence of said conviction and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof, excepting convictions involving the following crimes: treason, mis-

* Matter in brackets [ ] stricken in original.

prison of treason, anarchy, all [capital cases,] *homicides other than death by driving a vehicle under N.J.S. 2A:113-9, assault on a head of state, as defined in N.J.S. 2A:148-6,* kidnapping, [perjury, carrying concealed weapons or weapons of any deadly nature or type,] rape, [seduction, aiding, assisting or concealing persons accused of high misdemeanors, or aiding the escape of inmates of prisons, embracery,] arson, [robbery or burglary] *or robbery, and further excepting that the court may continue the hearing for 30 days and order an evaluation of such person by the Diagnostic Center if he was committed to such center before sentencing.*

For services performed under this section same fees shall be taxed as are usual for like services in other matters, which fees shall be payable by the petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-3

JOHN GISH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH A. RIZZI,
Attorney for Respondent, The Board of Education of the Borough of Paramus,
25 East Salem Street,
Hackensack, New Jersey 07602

WINNE, BANTA, RIZZI & HARRINGTON,
25 East Salem Street,
Hackensack, New Jersey 07602,
Of Counsel.

JOSEPH A. RIZZI,
ROBERT M. JACOBS,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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Questions Presented

1. Whether Respondent's request that Petitioner undergo a psychiatric examination, pursuant to a constitutionally valid statutory provision designed to assist

boards of education in determining a teacher's fitness to teach, and based upon Respondent's judgment that Petitioner's conduct evidenced deviation from normal mental health, violated Petitioner's First Amendment Rights.

2. Whether Respondent's denial of Petitioner's request to confront and cross-examine medical experts consulted by Respondent as additional sources of opinion for Respondent's own use in making its independent judgment that Petitioner's conduct evidenced deviation from normal mental health, violated Petitioner's rights of due process of law.

Counter-Statement of the Case

Petitioner John Gish has been employed by the Paramus Board of Education (the "Respondent") since 1965. On June 14, 1972, Petitioner assumed the presidency of the Gay Activist Alliance of New Jersey. Subsequent thereto, as a result of his assumption of the presidency of the Gay Activist Alliance of New Jersey, and as a result of his efforts to promote the cause of the Gay Liberation Movement, Petitioner was the subject of a large volume of publicity, in both the local and national media.

As a result of Petitioner's conduct, as observed by Respondent Board, and of the publicity attendant upon Petitioner, which publicity was a natural and foreseeable consequence of the activities of Petitioner in promoting the cause of the Gay Liberation Movement, a meeting was held on July 10, 1972 at the office of the Respondent Board's Superintendent of Schools. At said meeting a hypothetical question was posed to Dr. Richard Roukema, School Consulting Psychiatrist, who was asked to state whether, in his professional opinion, and with a reasonable degree of medical certainty, the course of action

undertaken by Petitioner would have a tendency to result in a strong possibility of potential psychological harm to the students of the Paramus School District as a result of their continued association with Petitioner. Dr. Roukema indicated an affirmative answer to this question. Thereafter, Respondent Board, by Resolution dated July 10, 1972 (PC-17a), resolved that, whereas, in its judgment, the actions of Petitioner constituted evidence of deviation from normal mental health, Petitioner be required to undergo a psychiatric examination pursuant to the terms of N.J.S.A. 18A:16-2 (PC-60a).

On August 10, 1972, Petitioner instituted a class action in the Superior Court of New Jersey challenging the constitutionality of N.J.S.A. 18A:16-2, which action was resolved by the decision of the Superior Court, *Kochman and Gish, et al.* v. *Keansburg Board of Education and Paramus Board of Education, et al.*, 124 N.J. Super. 203, 305 A. 2d 807 (Ch. Div. 1973), upholding the statute in question as constitutional and mandating the use of certain standards and guidelines prior to the application of N.J.S.A. 18A:16-2, namely, that before a teacher is required to submit to a psychiatric examination, the teacher is entitled to a statement of reasons for such examination and the teacher must be afforded the right to be heard by the board before the statute is applied.

Subsequent to the decision upholding the statute's constitutionality, Respondent Board, by Resolution adopted on June 28, 1973 (PC-20a-21a), reaffirmed its previous Resolution that Petitioner undergo a psychiatric examination. Pursuant to the Opinion of the Court in *Kochman* v. *Keansburg, supra,* a Statement of Reasons for Respondent Board's request that Petitioner undergo a psychiatric examination was presented to him by letter dated June 7, 1973 (PC-18a-20a), and an additional State-

ment of Reasons was presented to Petitioner by letter dated August 9, 1973 (PC-21a-23a). Thereafter, hearings were held by Respondent, on August 9, 1973 and August 22, 1973. At said hearings Petitioner was present, was represented by counsel of his own choosing, was afforded the right to make statements, and have others (including experts) make statements on his own behalf, to respond, to refute and challenge as inaccurate the Statements of Reasons furnished Petitioner, and to attempt to convince Respondent Board of the unreasonableness or incorrectness of its judgment, namely, that Petitioner's conduct evidenced harmful, significant deviation from normal mental health affecting Petitioner's ability to teach, discipline or associate with children of the age subject to Petitioner's control in the Paramus School District, and of its decision, namely, that Petitioner undergo a psychiatric examination.

At such hearings, Petitioner requested, and was denied, the opportunity to confront and cross-examine Dr. Richard Roukema, Paramus School Consulting Psychiatrist, and Dr. Edward Lowell, Psychiatrist. Respondent Board had presented Statements of Hypothetical Facts to Drs. Roukema and Lowell and sought their opinions as to these hypothetical facts, merely to test its own independent judgment that Petitioner's conduct was such that an examination was in order. In the Board's view, the responses of the psychiatrists had assisted the Board by adding some objective medical advise which did buttress the Board's lay judgment that Petitioner evidenced deviation from normal mental health as defined in *Kochman* v. *Keansburg, supra.*

Subsequent to the conclusion of such hearings, by letter dated August 28, 1973 (PC-30a), Petitioner was once again directed to undergo a psychiatric examination, pursuant

to the terms of N.J.S.A. 18A:16-2 and N.J.S.A. 18A:16-3, and based upon Respondent Board's continuing judgment that Petitioner's conduct evidenced a harmful, significant deviation from normal mental health affecting his ability to teach, discipline or associate with students of the Paramus Public Schools.

Thereafter, a Petition of Appeal dated August 28, 1973 (PC-30a) from the directive of the Board was filed by Petitioner with the Commissioner of Education of New Jersey, resulting in a decision of the Commissioner of Education (PC-14a) upholding as lawful and reasonable Respondent's procedures and directive and ordering Petitioner to submit to a psychiatric examination. This decision was affirmed by decision of the State Board of Education on June 26, 1975, and by the Appellate Division of the Superior Court of New Jersey, by decision dated November 4, 1976, 145 N.J. Super. 96, 366 A. 2d 1337 (App. Div. 1976) (PC-2a). A Petition for Certification was denied by the Supreme Court of New Jersey on March 15, 1977 (PC-1a).

ARGUMENT

I. Respondent's request that Petitioner undergo a psychiatric examination, pursuant to a constitutionally valid statutory provision designed to assist Boards of Education in determining a teacher's fitness to teach, and based upon respondent's judgment that Petitioner's conduct evidenced deviation from normal mental health, in no respect violated Petitioner's First Amendment Rights.

Respondent contends that the decision of the Appellate Division of the Superior Court of New Jersey (by which it was determined that the action of Respondent directing that Petitioner undergo a psychiatric examination pursuant to the provisions of N.J.S.A. 18A:16-2 and N.J.S.A. 18A:16-3 satisfied in all respects Petitioner's constitutional rights under the First and Fourteenth Amendments to the United States Constitution) is in accord in all respects with all applicable decisions and precedents of this Court. Respondent further contends that Petitioner has failed to advance any "special and important reason" pursuant to Supreme Court Rule 19 for this Court to exercise its discretion to issue the Writ of Certiorari, and that, as a result, the Petition must be denied. *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 502 (1951); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 73-4 (1955). Respondent contends that the lack of such "special and important reason", based upon the absence of a question of public importance, *Pittsburgh Steamship,* 340 U.S. at 502, is supported by the denial, pursuant to Rule 2:12-4 of the Rules Governing the Courts of the State of New Jersey, of Petitioner's Petition for Certification to the New Jersey Su-

preme Court (PC-1a), which Rule, in language similar to this Court's decisions applying Rule 19, provides for the granting of Certification ". . . only if the appeal presents a question of general public importance. . . ." By its denial of the Petition for Certification, the Supreme Court of New Jersey found there to be no such question of general public importance.

The decision of the Court below conclusively established that Respondent's directive to Petitioner to undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2 was the result of the fair and reasonable judgment of the Board, based upon credible and substantially undisputed evidence, that the course of conduct of Petitioner evidenced a harmful, significant deviation from normal mental health affecting Petitioner's ability to teach, discipline or associate with children of the age of the children subject to Petitioner's control in the school district.

Respondent contends, and the Court below agreed, that its judgment was made consistent with the compelling state interest expressed by the Superior Court of New Jersey in *Kochman* v. *Keansburg, supra,* as follows:

> "The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classified as a compelling state interest." (305 A.2d at 812).

Indeed, the overriding and compelling state interest in determining the fitness of teachers, as expressed in *Kochman,* has long been recognized by this Court. *See, e.g., Adler* v. *Board of Education of the City of New York,* 342 U.S. 485 (1952).

Petitioner, however, in seeking to assert some "special and important reason" why this Court should review the decision of the Court below, argues that Respondent's directive that he undergo a psychiatric examination to enable it to determine his fitness, and to confirm or disprove its judgment, results in an unconstitutional infringement upon First Amendment rights, which rights, Petitioner asserts, may never be suborned to the will of a governmental agency, and results, Petitioner contends, in the failure of the Court below "to protect the integrity of its own process." (PC-5). Respondent contends that such vague and meaningless assertion by Petitioner fails to advance any special or important reason for this Court to review the decision of the Court below.

The decision of the Court below makes abundantly clear (PC-8a) that Petitioner's contention ignores the well established principle frequently enunciated by this Court, namely, that constitutional rights, including the right to speech, are not absolute, but that a compelling state interest may justify the incidental invasion or inhibition of even First Amendment rights. *See, e.g., United States* v. *O'Brien,* 391 U.S. 367 (1968); *DeGregory* v. *Attorney General of The State of New Hampshire,* 383 U.S. 825 (1966); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Branzburg* v. *Hayes,* 408 U.S. 665 (1972). In the matter *sub judice,* Respondent contends that the existence of such a compelling state interest, namely, the protection of school children from the influence of unfit teachers, cannot possibly be denied.

Petitioner's further assertion that Respondent, in arriving at its judgment that Petitioner's conduct evidenced deviation from normal mental health, failed to observe any conduct involving classroom activities and, that, as a result, fundamental notions of justice have, in some un-

stated manner, been offended, likewise ignores well established principles enunciated by this Court which recognize that a board of education, in determining the fitness of a teacher, may have valid concerns extending beyond the classroom. As stated by this Court in *Shelton* v. *Tucker,* 364 U.S. 479 (1960):

> "There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize.
>
> 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' *Adler* v. *Board of Education,* 342 U.S. 485, 493, 96 L ed 517, 524, 72 S.Ct. 380, 27 ALR2d 472. There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors' *Beilan* v. *Board of Education,* 357 U.S. 399, 406, 2 L ed 2d 1414, 1420, 78 S.Ct. 1317." (364 U.S. at 485).

As the Court below has determined, quoting from the earlier decision of the Commissioner of Education and consistent with the above expression by this Court, Respondent's directive that Petitioner undergo a psychiatric examination was made by individuals "concerned with Petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils" (PC-10a).

Respondent contends that the cases cited by Petitioner, by which Petitioner seeks to equate the Board's action in the matter *sub judice* with actions designed to impose sanctions or penalties upon teachers, or to retaliate

against teachers for the exercise of free speech, are inapposite. Rather, the statute under which Respondent acted represents a considered legislative mechanism providing to a local board of education the ability to apply the expertise of a psychiatrist to confirm or disprove its judgment, namely, that it has observed signs of what it considers a harmful, significant deviation from normal mental health.[1]

The decision of the Court below expressly recognizes that the requirement that Petitioner subject himself to a psychiatric examination can hardly be classified as a penalty or a sanction (PC-11a) resulting in the deprivation of an interest in liberty or property, *The Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), such as non-renewal of employment made by reason of the exercise of constitutionally protected First Amendment rights, absent an overriding interest on the part of the employer. *Mt. Healthy City School District Board of Education* v. *Doyle*, —— U.S. ——, 50 L. Ed. 2d 471, 97 S.Ct. 568 (1977). Rather, Respondent contends that, as the Court below has held, the Board's requirement that Petitioner undergo a psychiatric examination must be viewed as a reasonable exercise of the Board's judgment in meeting its mandated duty of determining the fitness of teachers. Such a directive fully protects, and in no respect violates, Petitioner's First Amendment freedoms.

Based upon the foregoing, Respondent contends that Petitioner has failed to advance any special and important reason for this Court to review the decision of the Court below.

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[1] The Court in *Kochman* v. *Keansburg, supra,* found that, ". . . although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist." 305 A.2d at 812.

I I. Petitioner's inability to confront and cross-examine medical experts consulted by Respondent as additional sources of opinion for Respondent's own use in making its independent judgment as to Petitioner's conduct in no way violated Petitioner's due process rights.

Petitioner's argument that Respondent has denied to Petitioner guaranteed rights of procedural due process, by its denial of Petitioner's request to confront and cross-examine two medical experts consulted by the Board in arriving at *its own* judgment that Petitioner's conduct evidenced deviation from normal mental health, rests, initially, upon Petitioner's implicit characterization of the role of such experts, which, upon analysis, can clearly be seen to be totally unfounded. Petitioner himself admits, and the Court below acknowledged in its decision (PC-11a), that he was not entitled to the full sweep of due process rights as contemplated by the Fourteenth Amendment at the hearings conducted by Respondent to afford Petitioner an opportunity to be heard prior to his undergoing the psychiatric examination directed by the Board. Petitioner asserts, however, that his inability at such hearings to cross examine the medical experts consulted by the Board as additional sources of opinion for its own use in arriving at its own independent judgment ignores that element of due process protection which requires an "impartial decision-maker." This assertion ignores and confuses the simple fact that Respondent Board, and not such medical experts, was the "decision-maker" in the matter *sub judice,* and that any required standard of impartiality must be applied to Respondent, rather than to any other person. No claim of lack of impartiality on the part of Respondent is even asserted.

Further, Petitioner's assumption of some "tainted" future involvement by the medical experts consulted by Respondent, or, indeed, any assumption of future involvement at all by such experts is simply unfounded. Since the Board was the only "decision-maker" in this case, the ability or inability of Petitioner to confront and cross-examine such experts is totally irrelevant to any constitutional guarantee of an impartial decision-maker and any procedural due process rights. As the record below amply establishes, Petitioner was afforded, at the hearings granted to him by Respondent, the unfettered and unlimited opportunity to present evidence and witnesses on his own behalf, and to inquire, explore, debate and challenge the Board's judgment with those individuals who were, in fact, the makers of such decision, namely, the members of the Board itself, all of whom were present at such hearing.

As is clear from the language of the statute under which Respondent acted, N.J.S.A. 18A:16-2, and under which a board may require a psychiatric examination whenever, *in the judgment of the board,* an employee shows evidence of deviation from normal mental health, such statute in no way obligated Respondent to enlist the independent opinion of any other source in arriving at its own independent judgment that an employee showed deviation from normal mental health. Rather, as the Commissioner of Education of New Jersey has found (PC-45a), Respondent sought opinions from two medical experts so as to insure that there was a reasonable basis for *its* judgment, but, significantly, Respondent did not wholly rely upon the medical experts' responses to the Statements of Hypothetical Facts and did make its own independent judgment, this pursuant to the statutory mandate and the compelling state interest which formed the legislative basis for the statute, that Petitioner should

undergo a psychiatric examination. Respondent contends in the matter *sub judice* that the Court below has correctly determined that Petitioner was afforded every reasonable opportunity, consistent with the judicial standards of due process enunciated by this Court, to challenge such judgment of Respondent, and to seek to convince Respondent of the erroneous nature or unreasonableness of such judgment.

Respondent contends that, given the particular and unique facts and circumstances in the matter *sub judice*, and given Petitioner's own admission that he was not entitled to the full sweep of due process rights as contemplated by the Fourteenth Amendment, there is no reasonable basis for the application in this case of a standard of due process which would give rise to a right to cross-examine medical experts (i) who have merely given to Respondent opinions, confirming Respondent's own independent judgment, based upon facts contained in Statements of Hypothetical Facts, likewise furnished to Petitioner, which were, with but one exception, not challenged by Petitioner as to their factual accuracy (PC-7a), and (ii) who possessed *no* knowledge relevant to the instant matter beyond the undisputed facts therein contained.

The finding by the Court below (that, as an element of procedural due process protection, Petitioner has not been denied an impartial decision-maker) is in no way affected or altered by Petitioner's unfounded assumption that the medical experts in question ". . . will, if the board has its way, examine Mr. Gish" (PC-12). This fact is clear from a reading of the statute under which Respondent acted, N.J.S.A. 18A:16-3 (quoted in full in the decision of the Appellate Division, PC-3a-4a), which provides to Petitioner the right to have the psychiatric examination conducted by a physician or institution of

Petitioner's own choosing, thus rendering totally meaningless Petitioner's procedural due process objection as to impartiality, even if one were to assume *arguendo* that any such physician must satisfy some standard of impartiality. The record below makes clear that Petitioner has chosen to ignore his own ability to "cure" such a perceived (and, in the view of Respondent and the Courts below, unfounded) deprivation of procedural due process by exercising his clear statutory right to choose the physician to conduct the examination in question.

Petitioner further seeks to assert that the standard and degree of due process necessarily to be afforded in the matter *sub judice* must be determined in light of Petitioner's having suffered an alleged "stigma" destructive of both property and liberty rights within the meaning of the Fourteenth Amendment, which "stigma", Petitioner contends, attaches to the Respondent's initial determination (that Petitioner undergo a psychiatric examination) and "creates a disability that *might* foreclose his ability to obtain employment opportunities in the future." (emphasis added) (PC-10). Petitioner, after having admitted that he was not entitled to the full sweep of procedural due process rights, but without suggesting any specific procedural rights to which he was not entitled, fails to set forth any manner in which the decision of the Court below is in conflict with, or not contemplated by, the traditional and well-established constitutional principles set forth by this Court with regard to the flexible standard of procedural due process rights applicable to a particular situation, which standards are dependent upon a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action. *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U.S. 886 (1961); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

In the instant matter Respondent has asserted, and the Court below has agreed, that there is no right or privilege *not* to undergo a psychiatric examination, and, further, that the requirement that Petitioner undergo such examination can hardly be classified as a penalty or sanction. Rather, such requirement must be viewed as a reasonable exercise of the Board's judgment in carrying out its mandated duty of determining the fitness of teachers (PC-11a). It is further significant, in light of this Court's well established principles of the interests of liberty and property, that the mere submission by Petitioner to the examination in question clearly has *no* impact or effect upon Petitioner's status as a teacher (PC-12a). Nowhere does Petitioner seek to assert that the mere undergoing of the examination in question results, for instance, in Petitioner's dismissal from his position, or in any other impact upon Petitioner's employment status. Respondent contends that Petitioner's argument that the determination that Petitioner undergo an examination creates a disability that "*might* foreclose his ability to obtain employment opportunities in the future" is thus inappropriate and, at best, premature. Thus, Respondent contends, the instant matter is clearly distinguishable from the decisions of this Court to which Petitioner refers, decisions in which the imposition of a sanction or penalty, clearly involving the deprivation of liberty or property, justified protection in the form of the full sweep of due process rights prior to the imposition of such sanction or penalty. *See, e.g., Pickering* v. *Board of Education,* 391 U.S. 563 (1968) (dismissal of a teacher); *Perry* v. *Sindermann,* 408 U.S. 593 (1972) (refusal to renew a teacher's contract). As a result, the decision of the Court below in the matter *sub judice* requires no review by this Court in light of such previous decisions by this Court.

In the matter *sub judice,* Petitioner asserts that to allow him to cross-examine the medical experts consulted by Respondent in making *its own independent* determination would, in some unstated fashion, preclude a stigma from being imposed as a direct result of procedural due process violations. Even if such a stigma were to exist, which the Court below did *not* find, Petitioner's position that such a stigma would destroy a constitutionally guaranteed "liberty", thus requiring, if not the full sweep of due process rights, at least, in Petitioner's view, the right to cross-examine certain experts consulted by Respondent to insure the reasonableness of its own independent judgment, is clearly contrary to (i) the recent decision of this Court in *Paul* v. *Davis,* 424 U.S. 693, *reh den* 425 U.S. 985 (1976), and (ii) the well established judicial expressions of this Court as to the purpose for granting the right to cross-examination as an element of procedural due process.

Respondent contends that the decision of the Court below is consistent in all respects with this Court's recent decision in the case of *Paul* v. *Davis, supra,* wherein the Court reviewed its prior decisions, particularly with respect to the range of protected interests enunciated by this Court in *Board of Regents* v. *Roth, supra,* and specifically the issue of whether the infliction of a stigma to one's reputation, standing alone, is either a "liberty" or "property" interest which, by itself, is sufficient to invoke the procedural protections of the Due Process Clause. In *Paul, supra,* this Court concluded that an interest in reputation alone, without an accompanying alteration or extinguishment of an additional, more tangible, right or status recognized and protected by state law, is not sufficient to invoke *any* of the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

Respondent submits that the "stigma" alleged by Petitioner, even if assumed *arguendo* to exist, falls squarely within the contemplation of this Court's decision in *Paul, supra,* and is therefore entitled, if to any protections, to no greater procedural due process protections than those previously granted Petitioner pursuant to the mandates of state law.[2] This conclusion is clear since, as the Court below found, no such accompanying protected right recognized by state law has been altered or extinguished by the Respondent's directive. In this regard, the Court below stated: "The submission by Gish to a psychiatric examination takes nothing from him except his time. His status as a teacher continues with full rights under the law. Therefore, from the standpoint of his being deprived of a right or privilege it is minimal, except as it may loom in his mind." (PC-12a). Respondent thus contends that Petitioner has not advanced any special reason to warrant a review by this Court of the decision below, especially in light of the recent holding of this Court in *Paul, supra. See also Bishop* v. *Wood,* 426 U.S. 341 (1976); *Ingraham* v. *Wright,* —— U.S. ——, 51 L. Ed. 2d 711, 97 S.Ct. —— (1977).

Petitioner has, in fact, failed to advance any cogent reason why his inability to cross-examine two medical experts consulted by the Board prejudiced his right and opportunity "to be heard". Petitioner has merely asserted that such an opportunity is necessary to avoid the imposition of a "stigma" (PC-12). Respondent contends that, given the particular facts and circumstances presented

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[2] With regard to the procedural due process rights held to be required by the terms of the statute in question, the Court in *Kochman* v. *Keansburg, supra,* held that before a teacher is ordered to submit to a psychiatric examination he is entitled to a statement of the reasons for such examination and to an opportunity to be heard. 305 A.2d at 812.

in the instant matter as to the role of the two medical experts consulted by the Board, and, further, given the undisputed holding of the Court below, namely, that the facts presented to such experts were, with but one exception, not challenged by Petitioner as to their accuracy (PC-40a), the decision of the Court below is in full accord with this Court's decisions as to the circumstances under which the rights of confrontation and cross-examination are mandated.

In the matter *sub judice* Respondent, in fact, sought and received the opinion of two medical experts, which opinions were based on Statements of Hypothetical Facts presented to them. Respondent sought such opinions for the purpose of insuring that there was a reasonable basis for Respondent's judgment, which judgment, pursuant to the statute under which the Board acted in this matter, N.J.S.A. 18A:16-2, is the only judgment upon which Respondent may base the exercise of its statutory right. As a result, such medical experts, possessing no independent facts and no facts with one minor exception challenged by Petitioner as to accuracy, and being incapable of offering any testimony dependent upon memory or relevant in any respect to any truth determining process in the instant matter, do not constitute adverse witnesses against Petitioner. Rather, they were merely the source of additional opinions sought by Respondent for its own use in making its own independent judgment. Such facts, which formed the basis of the decision of the Court below, do no violence to this Court's consistent application of frequently considered constitutional principles as to the circumstances which give rise to the necessity of confrontation and cross-examination. *See, e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (requiring the opportunity to confront and cross-examine adverse witnesses where important decisions turn on questions of fact); *Chambers* v.

Mississippi, 410 U.S. 284 (1973) (requiring confrontation and cross-examination to help assure the accuracy of the truth-determining process); *Greene* v. *McElroy,* 360 U.S. 474 (1959) (requiring confrontation and cross-examination where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or person motivated by malice, vindictiveness, intolerance, prejudice or jealousy); and *Richardson* v. *Perales,* 402 U.S. 389 (1971) (requiring confrontation and cross-examination where factual credibility and veracity are at issue).

Respondent thus contends that further examination by the Supreme Court of the United States of the reasonableness of the hearings afforded to Petitioner by Respondent, submitted for review under the label of a denial of procedural due process rights, is clearly not warranted.

CONCLUSION

For the foregoing reasons we respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH A. RIZZI,
Attorney for Respondent, The Board of Education of the Borough of Paramus.

WINNE, BANTA, RIZZI & HA[illegible]TON,
25 East Salem Street,
Hackensack, New Jersey [illegible],
Of Counsel.

JOSEPH A. RIZZI,
ROBERT M. JACOBS,
On the Brief.